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THE
LAW CHRONICLE:

A

MONTHLY JOURNAL,

CONTAINING

TREATISES ON THE VARIOUS BRANCHES OF THE LAW, NOTES OF
LEADING CASES AND OF STATUTES, SHORT NOTES OF LEGAL
NEWS, LEGISLATIVE MEASURES, AND OTHER MATTERS
OF INTEREST TO THE PROFESSION,

AND

A Complete Summary or Digest of Cases,

BY WHICH THE STUDENT AND PRACTITIONER ARE KEPT CONGNISANT OF
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CONVEYANCING PROGRESS AND ITS DIFFICULTIES.

ONE great hindrance to progress in conveyancing—the handiwork of a liberal profession—is the timidity or unwillingness of the heads of that branch to sanction any deviation from old forms. It is easier to frame a deed verbosely than concisely. The ranging two or more synonyms is more agreeable than the selection of one word comprising the exact idea intended to be expressed. The labour of the hand is less irksome than the working of the brain. At all events, the latter employment is in general confined to the frame and plan of the deed rather than the details. Unfettered as is conveyancing, with the necessity for any particular form, it contains within itself the elements most favourable to progress and scientific improvement. Nevertheless, it must be confessed that no branch of the profession has so little improved as the system of drafting deeds. What the professors of the art would not do, was sought to be done by the aid of the Legislature. Because conciseness, “against which there is no law,” was not attempted by the conveyancer, brevity was suggested and offered by statutory forms:

The principle was good, and the result desired was one which the public, whose servants we are, was entitled to; yet the mode in which the end was to be attained was so clumsy and puerile, that the statute soon became a dead letter. In fact there was never any vitality in it. What the public wanted was a document which they could read and understand; and, as a necessary consequence of these qualities, to do so in a small compass and few words—what they got was, a form of words which were to mean, not what they said, but another formula specified in the act. This was a most bewildering process to the layman, and hardly less troublesome to the professional. A document which could only be understood by the aid of, and comparison with, another document was not likely to find much favour with any one. A letter in cypher is not the most easy thing to read; a statutory concise deed was less so. But was there any occasion for this? Is not the English tongue susceptible of expression, and clearness, and brevity? Surely a language which contains such a sentence as, “Let there be light, and there was light,” is not wanting in strength or conciseness. We wonder how a conveyancer would express that sentence. Somewhere in our reading, we fancy a specimen of his mode of stating it was exhibited. Why have not our forms of deeds improved? We answer, because the old stagers will not allow it, and the young ones cannot afford to do it. Let a young conveyancer, just starting in his career, venture to prune his drafts of verbiage—we mean thoroughly

and scientifically—and he is lost. The solicitor of many years standing is amazed at it. He ventures to show it to some veteran in chambers, and he shrugs his shoulders, and the thing is done for. The novellist—the innovator—the not-safe man, is discarded, and his drafts become few as well as short. Is not this the case? How many can vouch it in their own proper persons? Frame your draft with a limitation to the purchaser “and his heirs,” and you will have to justify the omission of, “and his assigns for ever.” Leave out the nauseous repetition of “executors and administrators” as an addition to the principal’s name, and see how much you lose in time and reputation by the omission. So with other excisions; and ultimately the conveyancer, earnestly desirous of improving the language of his drafts, is beaten down by the continued opposition and senseless doubts and sneers which are cast upon his labours. He rapidly degenerates, and is lost in the old ruts of verbiage.

Turning from these matters, which, if followed, would only lead to a series of notes and hints on “short forms,” we will give an instance how an alteration in principle—justifiable for brevity and economy—was met by one of the most learned and deservedly respected of conveyancers. A man from whom we hoped better things.

Trustees of a settlement had dropped off by death: new trustees were to be appointed by the sole surviving trustee. The property was partly stock, and partly *leaseholds*. As to the stock, there was no difficulty in getting it into the names of old and new trustees. How it is effected we hardly know; but we fear the benighted people at the Bank of England (well may she be represented as “the Old Lady of Threadneedle-street”) actually allow F., the stock owner, to transfer it into the names of F. (*the same F.*), G., and H. Now we know that this is most heterodox; for how can a man assign to himself. We know it cannot be done, and it is no use telling us lawyers that it is done. “This people who knoweth not the law are cursed.”

Now, as to the *leaseholds*. How are they to be got out of the old trustee, and put into the old and new trustees jointly? Had they been freeholds, the job could have been done neatly and scientifically. F., the old trustee, could have conveyed the land to G. and his heirs, to the use of F., G., and H., and their heirs, and the object is effected in a simple and lawyer like way. There are other modes of doing it, but none so neat as the above. The statute of uses executes the use, and F., G., and H. are invested with the freehold and inheritance as surely as if originally appointed. No one, we believe, doubts this, except perhaps the settlor or the *cestuis que trustent*, who are utterly unable to comprehend it.

That is of no moment: we have already favoured them with an appropriate remark.

But, as to the leaseholds. How are they to be got out of F., and put into F., G., and H. One deed has sufficed as to the freeholds, although the property was almost a principality, and the estate the entire fee-simple. What is to be done with this house held for the unexpired term of 42 years at a rent of £1, and worth, to let, £20 per annum? Will not one deed suffice? "Should the trust estate consist of money in the funds, the stock may be transferred into the joint names of the old and intended new trustee" (Lewin on Trusts, 466). How this is effected, the learned author does not say. Probably he thought it was managed in some absurdly direct mode by the wise men of the East. However, as might be expected, no precedent is created westward; for he proceeds, "If the trust estate consist of *chattels real*, the parties cannot effectuate their object but at the trouble and expense of two deeds." This is the mode. F., by one deed, assigns the house to X., upon trust that he do immediately assign it to F., G., and H.; and then X., by another deed, assigns it to F., G., and H. We admit this is the principle of the transfer, and no other is correct. But, why two deeds? Why will not one suffice for this wretched little term? Make the whole one deed. Let F. assign to X. upon trust as above, and by another *testatum* let X. assign to F., G., and H. For authority justifying such a course, we will produce it in abundance. But first, what is the objection? It is two deeds, with distinct operations in one. Well, what of that? Do not fifty tenants in common convey by one deed, and has not the deed fifty distinct operations? But it has a consecutive double operation. Has not every revocation of old uses, and appointment of fresh uses, a similar operation, and yet these are found in one deed without doubt or scruple. Lord Coke says, "The law will adjudge priority of the operation of one and the same deed, although it be sealed and delivered at one and the same instant; and therefore it shall be first, in construction of law, a revocation and cesser of the ancient uses, and then a limitation in raising of the new" (*Digge's case*, 1 Rep. 174 b.). Lord St. Leonards, citing the above case, proceeds, "Nor is this the only case in which the law adjudges priority in distinct parts of one and the same deed. It is upon this principle that a *lease and release* by the same deed has been several times ruled to be a good conveyance; for priority shall be supposed" (Powers, 210, 5th edit.). To these authorities may be added the conveyance of land to a purchaser, and the grant of a rent charge thereon by one and the same conveyance. The double consecutive operation is unquestionable. Then in another case the principle was clearly established.

F. and G. conveyed to S., excepting and reserving to F., G., and M., a liberty of hunting. The Court of Queen's Bench decided, that although this was not effectual as a reservation properly so called, yet it might be upheld as a *new grant* by S. (who had executed the deed), and executed in favour of M., although no party (2 Ad. and El. 705).

Upon authority the case seems clear. Now let us turn to practice. A young conveyancer settled a transfer of leasehold from an old trustee to old and new trustees by one deed. It contained two *testatums*; and, in fact, cutting off the head and tail piece of the deed number two, it was bodily appended to deed number one.

The draft was doubted and laid before one of our first conveyancers—we think no greater or more talented could be named—and here is his opinion: "I have perused this draft, and although I am disposed to agree with Mr. —, that on principle the operations of the assignment and re-assignment would be consecutive in the order requisite to effectuate the intention, yet I think that in the actual state of the authorities and practice, this mode of framing the instrument is too experimental, and not wise economy. It will be better, I think, to pursue the ordinary course of assigning and re-assigning by separate deeds."

What pretensions has conveyancing to the dignity of a science after a high priest delivers such an opinion. The principle of the draft is admitted to be sound, yet it is condemned as "too experimental," and the other objection is the "actual state of the authorities," of which, however, not one is suggested, nor is it believed could one be found in any way overruling the authorities quoted, and which the learned gentleman was referred to. Will the conveyancer who originally framed the draft continue his attempts to improve conveyancing? We trow not. In a few years he will shrug and doubt and talk of experiments, and unwise economy, and safer courses, and state of authorities, as if he were a very oracle. There is, however, this advantage, that for those who desire to accomplish the conveyancing feat of getting leaseholds vested in old and new trustees in an economical way, there is the authority of the above references, and, we may add, of the above opinion also; for if the gentleman who delivered it could not suggest a doubt upon it, we do not believe that any objection exists.

As to the stamps, we think it reasonably clear that one stamp—35s.—is alone necessary on the deed, notwithstanding its double operation. The transaction is a single one, though the *modus operandi* may be duplex. That seems the test and not the number of parties or their dealing. For instance, tenants in common convey by one stamp, though the deed is

the several alienation of each. Assuredly the courts would in these times lean strongly to the reasonable conclusion, that the intention being a sole one, the stamp should not be doubled by reason of the necessary double operation of the deed.

H. S. Y.

NOTICES OF NEW BOOKS.

DAVIS'S COUNTY COURTS.—

The New Practice of the County Courts in Actions and other Proceedings, with the Statute 19 & 20 Vic. c. 108, and the Rules thereon: being a Supplement to the 2nd Edition of the Manual of the Practice and Evidence in the County Courts. By JAMES EDWARD DAVIS, Esq., Barrister-at-Law. London: Butterworths.

The above explains in some degree the nature of the work of which it is the title-page, and relieves us from the necessity of pointing out the object of the author. Though, however, a supplement to another work, it is so arranged as to be complete in itself, and offers a complete manual of the existing county court practice. By means of this work the reader will readily comprehend the effect of the recent alterations in the county court practice; and as it has the new act, and the rules issued in pursuance thereof, including the forms *in extenso*, it is almost indispensable to the practitioner. But, of course, the most valuable part of the volume is that containing the treatise, in which Mr. Davis has arranged and methodised the various provisions of the act and rules, under the following primary heads:—Chapter I. Jurisdiction; Chapter II. Commencement of Proceedings; Chapter III. Summons and Service; Chapter IV. The Defendant's Proceedings; Chapter V. Removal of Plaints and Objections to Jurisdiction; Chapter VI. Proceedings between the Summons and Trial; Chapter VII. The Trial and Judgment; Chapter VIII. Proceedings between Judgment and Execution; Chapter IX. Execution; Chapter X. Replevins; Chapter XI. Possession of Tenements; Chapter XII. Interpleader; Chapter XIII. Costs of Attorney and Counsel; Chapter XIV. Insolvency, Protection Cases, and Absconding Debtors; Chapter XV. Charitable Jurisdiction; Chapter XVI. Equitable Jurisdiction; Chapter XVII. Jurisdiction under certain Statutes—i. e., Succession Duties, Customs, and Arresting Ships; Chapter XVIII. Metropolitan Building Act, 1845; Chapter XIX. Judges and Officers of the Courts; Appendix, containing Act, New Rules, Forms, Scale of Costs, and Schedule of Fees, &c. A very complete Index finishes the work, which comprises upwards of 400 pages.

We noticed the original work of Mr. Davis,

and we can now say that the supplement to it is executed in a similarly meritorious manner, and that in our opinion it is the most useful work yet published on the county courts. We should, however, observe that the parts relating to the equitable and statutory jurisdiction of the county courts are too slight to be of much utility. An extract from the work will, however, best show the manner in which Mr. Davis has executed his task. The 2nd part of Chapter II. treats of the "Commencement of the suit and entry of the plaint," and the following is taken from this part:—

"Preliminary proceedings before entry of the plaint.

—Having ascertained the court in which the plaint should be entered, the plaintiff is in general in a condition to commence the action by giving the necessary instructions to the registrar.

"Obtaining leave to issue summons.—As already mentioned, however, a plaintiff may have to obtain leave to issue the summons.

"Obtaining consent.—If the defendant has consented to give the court jurisdiction to try the matter in dispute, a memorandum of agreement must be signed.

"Notice of action.—If the action be one in which notice of action is required (as in the case of actions against justices for acts done in the execution of their office), such notice must be given.

"Actions by infants.—Where an infant applies to enter a plaint for any cause of action (other than for wages or piece-work, or for work as a servant), he must procure the attendance of a next friend, at the office of the registrar, at the time of entering the plaint; and no plaint can be entered until the next friend has undertaken, in the form set forth in the schedule, to be responsible for costs, who on entering into such undertaking is liable in the same manner and to the same extent as if he were a plaintiff in an ordinary suit; and the cause proceeds in the name of the infant by such next friend, and the undertaking is filed by the registrar; but no order of the court is necessary for the appointment of such next friend. If the plaintiff fail in, or discontinue his suit, and do not pay the amount of costs awarded by the court to be paid by him to the defendant, proceedings may be taken for the recovery of such amount from the next friend as for the recovery of any debt ordered to be paid by the court.

The cases of actions for wages, piece-work and work as a servant, are excepted, because the statute 9 & 10 Vic. c. 95, s. 64 (as extended by the statute 13 & 14 Vic. c. 61), expressly enacts, that it shall be lawful for any person under the age of twenty-one years, to prosecute any suit in any county court, for any sum of money not greater than fifty pounds, which may be due to him for wages or piece-work,

or for work as a servant, in the same manner as if he were of full age. No alteration in this respect was made by the new act.

"In other cases the preliminary step is a condition precedent to the right of action.

"*Letter before action.*—Further, in actions where the debt or damage claimed exceeds £20, the plaintiff's attorney ought in general to write a letter to the defendant before commencing the action, as by the new "scale of costs and charges to be paid to counsel and attorneys in the county courts," a letter before suit is allowed for.

"*Names of the parties, and description and residence of the defendant in general.*—Assuming that no such prior step is required, or if required that it has been accomplished, the proceedings commence by the entry of a plaint, which the registrar of the court records in a book kept specially for that purpose. The plaintiff, in order to enter his plaint states *viva voce*, or in writing, to the clerk, his own name, addition, and residence; and the name, addition, and residence of the defendant, or such other description as will serve to identify him. He then states concisely the cause of complaint.

"*When the name of the defendant is unknown.*—Where the plaintiff is unacquainted with the defendant's christian name, the defendant may be described by his surname, or by his surname and the initial of his christian name, or by such name as he is generally known by, and the defendant may be so described in the summons; and in the event of the plaintiff or defendant not appearing, proceedings at the trial, whether the parties appear or not, may be taken as if the true christian name and surname had been stated in the summons, and all subsequent proceedings thereon may be taken in conformity with such description, but without prejudice to any amendment made at any future time by direction of the judge.

"The rule on this subject is nearly in the same terms as the former rule.

"*Nature of the summons to be issued.*—When the action is for a debt or liquidated money demand exceeding twenty pounds, the plaintiff must instruct the registrar as to whether the summons is to be issued with a view to obtain judgment by default; or if the action be on a bill of exchange or promissory note, whether the summons is to be issued under 'The Summary Procedure on Bills of Exchange Act, 1855.' So a plaintiff suing an executor or administrator must instruct the registrar, if he wishes the summons to charge that the defendant has had assets and has wasted them, with a view to obtaining judgment *de bonis propriis*.

"*Several defendants.*—Where a plaintiff has any demand recoverable against two or more persons

jointly answerable he has the option of proceeding against one or against both, or, if more than two, against all or any portion of the number; and in that case it seems to be immaterial whether the names of the persons he does not proceed against are inserted in the summons. The more correct course, however, where he or they are not sued, appears to be to omit him or them altogether. Any injustice that might be the result of selecting only one out of two or more who are equally liable, is remedied by the provision, that the selected defendant against whom judgment is obtained may, on satisfying such judgments, demand and recover in the county court contribution from any other person jointly liable with him.

"When the plaintiff proceeds against two or more defendants, the registrar should be instructed to enter the plaint against both or all, and the summons should be against all the parties sued. Where all the defendants are not resident in one and the same district, the proper course to adopt is to apply to the court for leave to issue concurrent summonses into different districts, by which all the defendants will be summoned to appear at the same court and at the same time.

"*Particulars of demand.*—On entering the plaint, the plaintiff must, in all cases, where the sum sought to be recovered exceeds 40s., deliver at the office of the registrar as many copies of a statement of the particulars of his demand or cause of action as there are defendants, and an additional copy to be filed. This rule is so far identical with the former rule on the same subject, but the new rule further directs that where the demand exceeds £50, but the plaintiff desires to abandon the excess or to admit a set-off, and sues for the residue, the abandonment or the admission of the set-off must be entered on the particulars before service; and in all cases the particulars are deemed part of the summons.

"*Particulars in actions for breaches of covenant.*—In actions for penalties to secure the performance of covenants, within the meaning of the 8 & 9 Will. 3, c. 11, the plaintiff must deliver particulars of the breaches on which he relies, in the same manner as required by the rule just mentioned, which, when delivered, are deemed part of the summons.

"It is to be observed that if the amount claimed in any case include a fraction of a penny, such fraction is not entered in the books of the court, and judgment cannot be given for such fraction."

EXAMINATION QUESTIONS.

(Trinity Term, 1857.)

PRELIMINARY.

I. Where, and with whom, did you serve your

clerkship? II. State the particular branch or branches of the law to which you have principally applied yourself during your clerkship. III. Mention some of the principal law books which you have read and studied. IV. Have you attended any, and what, law lectures?

COMMON LAW.

I. State the distinction between actions of contract and of tort; and between simple contract and specialty debts. II. What is the proper mode of suing on a bill of exchange or promissory note, with respect to indorsing the writ of summons, the time for signing judgment for want of appearance, and obtaining leave to appear and defend? III. Which of the parties to a bill of exchange is *primarily* liable to pay it; and how is this liability affected by the bill being accepted for accommodation? IV. What is the difference between libel and slander? V. By whom are replevins now granted; and in what court may an action of replevin be commenced? VI. Where an action is brought in a superior court to recover a less sum than £20, due upon a contract, what course must be taken to enable the plaintiff, if he succeeds, to recover his costs; and on what scale will such costs be taxed? VII. In what manner may judgment be signed for non-appearance to a writ specially indorsed; and where one or two defendants upon whom such a writ has been served appears, and the other does not, how may the plaintiff proceed? VIII. In what cases is a master responsible in damages for a tortious injury done by his servant; and how may his liability be altered by the fact of the injured party being also his servant? IX. What step is it necessary for an attorney to take before he can bring an action for his bill of costs? X. What notice to quit is generally required in order to determine a yearly tenancy, and to what period of the year must it refer? XI. At what time after verdict may a successful party sign judgment and issue execution? XII. In what cases, and under what circumstances, may a party appeal from the decision of a superior court upon a motion for a new trial, or to enter a verdict pursuant to leave reserved; and what notice of appeal must be given, and to whom? XIII. In what manner may a judgment obtained against a registered joint-stock company be enforced against a shareholder? XIV. With what exceptions may the parties or their wives be examined as witnesses in their own causes? XV. Is it necessary to call an attesting witness to prove any, and what, species of written instrument?

CONVEYANCING.

I. By what means are the respective species of property usually conveyed or transferred? II. If

land be conveyed, and no mention be made of the buildings thereon, nor of mines or minerals thereunder, would such buildings, mines, and minerals pass by the conveyance? What is the rule in such cases? III. Suppose a pool or piece of water be granted, what passes to the grantee? IV. Under what authority may an estate tail be now barred, by whom, and in what manner? V. What are emblements, and when is a lessee of a tenant for life entitled to emblements, and when not? VI. What is the difference between a jointure and a dower, and how does each arise? VII. A. holds a lease for several lives, and he makes underleases; upon the death of one of the lives, he wishes to surrender the existing lease, and to have a new lease for the existing lives, with the addition of one in the place of the deceased. Would it be necessary that the underlessees concur in that surrender, or not? VIII. A testator appoints C. and D. executors of his will; C. renounces, and D. proves the will alone, and has probate; D. dies in the lifetime of C.; how stands the representation to the testator, and how is an assignment to be obtained from a legal representative? IX. The mortgagee in fee dies without devising the security, the mortgagor is desirous to pay the money; the heir-at-law of the mortgagee is unwilling or incapable to reconvey; to whom may the mortgagor pay the money, and of whom obtain the reconveyance? X. As to the registering of deeds affecting property in registered counties, what may be the consequence from delaying to register such deeds? XI. Title-deeds abstracted, are not in the vendor's possession, but in the hands of other persons, how are such deeds to be examined, and at whose expense? XII. What is the distinction between estates in remainder, and estates in reversion? XIII. Two persons, A. and B. (not partners), are to give bond to C. for the payment of a certain sum of money; what should be the obligation so that if B. die and leave A. surviving, C. may have a claim upon B.'s estate? XIV. Suppose A. and B. are partners, and give their joint bond to C., and A. or B. die, what remedy would C. have against the survivor, and the estate of the deceased? XV. Suppose one of the joint and several obligors to be merely a guarantee for the other, what should such guarantee require from the co-obligor for his security?

EQUITY.

I. Mention some of the ordinary cases in which the Court of Chancery exercises jurisdiction as distinguished from the courts of law. II. When a mortgagee enters into possession of the mortgaged estate, what is the proper proceeding to be taken by the mortgagor desirous of redeeming the mortgage; and

is there any, and what, limit to the period within which such proceeding must be commenced? III. If a legal estate be outstanding in an infant, or a person of unsound mind, as a trustee, state the nature and effects of the summary proceeding to be taken under the Trustee Act for getting in the legal estate. IV. Refer to any recent Act of Parliament under which the Court of Chancery (notwithstanding the absence of a power in the settlement) can authorise a sale or lease of settled estates without a special application to Parliament. V. State shortly the circumstances in which the Court is, by the Act referred to, authorised to exercise jurisdiction, and the mode of proceeding. VI. What are the several modes in which the parties, plaintiffs and defendants, in a suit in Chancery, may adduce evidence to verify their respective cases for the hearing of the cause? VII. How should an affidavit to be used in the Court of Chancery distinguish facts of circumstances which are within the deponent's own knowledge from those which are deposed to from his information and belief; and is it necessary to show, upon the affidavit, what are the deponent's means of knowledge or source of information. VIII. If no interrogatories be filed requiring an answer by a defendant to a bill, is he at liberty within any, and what, time to put in a voluntary answer? IX. Where a defendant is not required to answer interrogatories, what is considered to be the effect of not putting in a voluntary answer? X. State the respective amounts of principal money and in annual payments which, if payable out of a fund under the control of the Court, to a married woman, entitle her to elect whether the amount shall be paid to her husband, or be made the subject of settlement. XI. If the married woman elect that the amount shall be paid to her husband, what is the mode of proceeding, and what evidence is necessary to obtain the order for such payment? XII. If before distributing the residue of a deceased's estate, an executor or administrator be desirous of being indemnified from unascertained debts and liabilities, is there any, and what, summary proceeding which he can take for this purpose without instituting a suit? XIII. By what instruments can a father appoint a guardian to his children, and what are the ordinary powers and duties of such guardian? XIV. In the absence of a guardian so appointed, what is the summary course of proceeding after the father's death for the appointment of a guardian, and procuring an allowance for the infant's maintenance. XV. State shortly the mode of proceeding by which a trustee may be relieved from the responsibility of administering trust-funds without instituting a suit?

BANKRUPTCY.

I. State briefly the principle of the bankrupt laws, and the relief which they afford. II. What are the three conditions necessary to constitute a bankruptcy? III. What persons have been deemed by the Courts liable to the bankrupt laws? IV. State the principle which determines whether a person is a trader within the meaning of the bankrupt laws. V. Distinguish those acts which constitute acts of bankruptcy only when coupled with an intention on the part of the debtor to defeat or delay creditors, from those which constitute acts of bankruptcy independent of such intention. VI. Distinguish those acts which are voluntary or active from those which are passive or merely omissions on the part of the debtor. VII. What is the course to be adopted for obtaining an adjudication of bankruptcy against a member of Parliament, and what constitutes his liability? VIII. What are the necessary facts regarding the bankrupt's estate to be ascertained, and steps to be taken, previous to filing a petition for adjudication? IX. What is the course of proceeding to obtain adjudication against a joint-stock company? X. What are the facts necessary to be stated in the petitioning creditor's affidavit of debt? XI. How must creditors prove their debts, and at what meetings, in order to become entitled to a dividend? and what, if anything, must be given up to entitle a creditor to a dividend? XII. Is there any distinction between mortgages of land and mortgages of personal property, as respects the relative rights of the mortgagees and assignees? and if so, upon what principle is such distinction made? XIII. What proceedings must be taken by the assignees before commencing an action, or suit, or before a reference to arbitration? XIV. What are the general rules with regard to the property of others, in the possession of the bankrupt, at the time of the bankruptcy? XV. Can any, and what, number of creditors, and how, bind the rest to accept a composition, and by what different modes of proceeding?

CRIMINAL LAW.

I. Have all the superior courts at Westminster a concurrent jurisdiction in criminal matters, or is it confined to any, and which of them, and who is the supreme coroner of the realm? II. Over what places does the jurisdiction of the Central Criminal Court extend? III. State the nature and jurisdiction of the Court of Quarter Sessions. IV. What is the Court of Petty Sessions? and state what is the general nature of business transacted at petty sessions. V. How are offences, which are subject to indictment at the suit of the Crown, divided in the English law, and in what respects do they differ from

civil injuries? VI. What is felony in the general acceptation of the English law? VII. Define accurately and concisely the common law offence of perjury. VIII. What number of witnesses is necessary to obtain a conviction for perjury, and why? IX. What is subornation of perjury? X. State the course of proceeding against a person accused of an offence in order to bring him to trial. XI. Can one or more magistrates admit to bail persons accused of felony? XII. May the Court of Queen's Bench, or a judge in vacation, admit a prisoner to bail in any, and what cases? XIII. What is an indictment, and state the mode of preferring, and shortly the material parts of an indictment? XIV. What is the nature of a criminal information? and in what way or ways must it originate? XV. State what, if any, are the conditions which the Court of Queen's Bench requires before granting a rule in a criminal information at the instance of a private prosecutor?

EXAMINATION ANSWERS.

(Trinity Term, 1857.)

COMMON LAW (*ante*, p. 5).

I. *Actions of contract and of tort*—Simple contracts and specialties.—Actions of contract and of tort are distinguishable in this respect: that the former arise out of some wrongful act in respect of an agreement between the parties, whilst the latter arise out of wrongful acts independently of contract. In each case there is a wrong committed which is sought to be remedied or compensated. Notwithstanding the abolition of forms of action, the distinction between actions *ex contractu* and *ex delicto* is of importance with reference to costs (1 Bac. Abr. 26; 3 Steph. Com. 431, 432, 2nd edit.) Debts by specialty or special contract are such whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal. Debts by simple contract are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by writing not under seal, or by mere oral evidence (2 Black. Com. ch. 30; 2 Steph. Com. ch. 5; Princ. Com. Law, 38). A simple contract will merge in a specialty (see 2 Exch. Rep. 627). A distinguishing feature of difference between specialties and simple contracts is, that the latter are not valid unless founded on a sufficient consideration, and they do not when in writing not under seal (with the exception of bills and notes) import a consideration; that is, the law will not presume a consideration till one appears. But where a security is under seal, it is binding on the party executing it, although there was no consideration for the making of it (4 East.

200; Fonbl. on Equity, Book 1, ch. 1, s. 1; Lowe v. Peers, 4 Burr. 2225; S. C. Wilmot, 364). But though the law, from the deliberation and solemnity which accompany the execution of a deed, presumes a consideration, and delivers the covenantee from the necessity of proving it, yet that doctrine applies only where the deed is good on the face of it; for a consideration cannot be presumed to support a deed which is void on the face of it (Selw. N. P. 482, 11th edit.). Another difference between specialties and simple contracts is, that in administration of legal (though not of equitable) assets a specialty debt has priority in payment over a simple contract debt (2 Black. Com. 465; Selwyn's Nisi Prius, 793—796, 11th edit.).

II. *Suing on bill or note*.—In the case of a bill of exchange or promissory note not more than six months over-due, the plaintiff may sue out a special writ, upon which he must indorse the particulars of his claim. If the defendant do not obtain leave from a judge to appear, and appear accordingly within twelve days from the service of the writ, the plaintiff may sign judgment, tax his costs, and issue execution. To obtain leave, it must be made to appear by affidavit that there is a defence to the action, on the merits, or that it is reasonable that the defendant should be allowed to appear (2 Chron. 58, 63—65, 281, 296, 321; 3 Id. 99, 199, 281, 306).

III. *Primary liability on bill; accommodation bill*.—The acceptor of a bill of exchange is the party primarily liable to pay it. This liability exists, though the bill be an accommodation bill, with respect to parties who have *bonâ fide* (even with notice, Rosc. Evid. 226) given a consideration for the transfer. With respect to the drawer of the bill, the acceptor is not liable to him, the acceptance being for his accommodation. The rule is, that as between the immediate parties to the bill or note, want of consideration may be insisted on (Chit. Bills, 182; Byles' Bills, 114, 3rd edit.; Rosc. Evid. 226; Whitaker v. Edmunds, 1 Adol. and Ell. 638; Key, Exam. Quest. div. "Common Law," 43, 44; 1 Chron. 326).

IV. *Libel and slander*.—A libel is a malicious defamation expressed in printing or writing, or by signs, pictures, &c., tending to injure the reputation of another, and thereby expose such person to public hatred, contempt, or ridicule, or whereby the party is liable to be prejudiced in the estimation of his friends and associates, and, consequently, suffers the damage incident to the loss of their friendship and support (2 Harr. and Edw. Nisi Prius, 1349; Princ. Com. Law, 210, 211; 3 Steph. Com. 447, 448, 2nd edit.; Bacon's Abridgm. tit. "Slander," 6 Rep. Crim. L. Com. 77). "If any man deliberately or

maliciously publish anything in writing concerning another, which renders him ridiculous, or tends to hinder mankind from associating or having intercourse with him, an action lies against such publisher" (per Wilmot, 2 Wilson, 403). Slander differs from libel in its origin, inasmuch as it is by word of mouth, and not, like libel, by writing, &c. There is also a great difference in degree as to what constitutes a libel, and what slander. Many words which, if spoken, would not be actionable, are actionable if published in the way of libel. Hence the word swindler, if spoken of another, unless it be spoken in relation to his trade or business (1 Law Stud. Mag., N. S., 209), is not actionable (Savile v. Jardine, 2 H. Black, 581; Wilby v. Elston, 8 Com. Ben. Rep. 142); but if it be published in the way of libel, it is actionable (I'Anson v. Stuart, 1 Term Rep. 748). Communications fairly warranted by any reasonable occasion or exigency, and honestly made, are denominated *privileged* communications, and for them no action lies (see Somervill v. Hawkins, 15 Jur. 450; S. C. 20 Law Journ., N. S., C. P. 181; Taylor v. Hawkins, 20 Law Journ., N. S., Q. B. 818). Another distinction between libel and slander is, that libels are punished criminally as well as civilly, but mere verbal slander, in general, is not punishable criminally, except it affects the Government or some magistrate, &c.

V. *Replevin*.—Replevins are now granted by the registrar of the county court of the district in which the distress is taken (19 & 20 Vic. c. 108, s. 68). The action of replevin may be commenced either in one of the superior common law courts, or in the county court of the district in which the distress was taken (19 & 20 Vic. c. 108, ss. 65, 66; Davis, Suppl. 144, 145; 3 Law Chron. pp. 55, 78, 79, 155, 218).

VI. *Costs, where claim less than £20*.—If a plaintiff sues in contract for less than £20, he should indorse a notice on the writ that he will, in case judgment goes by default, apply for the costs of the proceedings (see Rule of Easter Term, 1857, stated *post*, p. 19). If the defendant pleads, and the plaintiff obtains a verdict, the judge should be asked to certify on the back of the record that it appeared to him at the trial that the cause of action was one for which a plaint could not have been entered in the county court, or that there was a sufficient reason for bringing the action in the superior court. If this certificate be not obtained, the plaintiff may apply to the court or a judge at Chambers, and if he can show that such action was brought for a cause in which concurrent jurisdiction is given to the superior courts, or for which no plaint could have been entered in the county court, or that there was sufficient reason for bringing the action in the superior court, the court or judge will direct the allowance

of the costs, which will, of course, be taxed on the lower scale (18 & 14 Vic. c. 61, s. 11; 15 & 16 Vic. c. 54, s. 4; Davis, 14—16).

VII. *Judgment on specially indorsed writ*.—If the defendant does not appear to a specially indorsed writ, the plaintiff files an affidavit of personal service of the writ, or if personal service cannot be effected, a judge's order for leave to proceed, and a copy of the writ of summons, and then signs judgment. If some only of several defendants appear, the plaintiff may sign judgment against those defendants who do not appear, and, without declaring against the others, may issue execution thereon, which is to be considered as an abandonment of the action against the appearing defendants; or the plaintiff may, before issuing execution, declare against the appearing defendants, stating the judgment against the non-appearing defendants, when such judgment will have the same effect as a judgment by default, for want of plea, formerly would have had (Common Law Procedure Act, 1852, ss. 27, 33).

VIII. *Master's liability for injury by servant; fellow-servants*.—A master is liable for the tortious act of his servant committed by his direction or with his assent, and this extends to the servant's negligent performance of the lawful orders of his master (Laugher v. Pointer, 5 B. and Cr. 559; Key, "Com. Law," 52, 53; Patten v. Rea, 29 Law Tim. Rep. 161; 3 Law Chron. 155, 387). In general, a master is not responsible for the negligence of a servant occasioning an injury to a fellow-servant working at or engaged on the same work; and this extends to a mere volunteer who is so injured (Hutchison v. Newcastle Railway Company, 5 Exch. R. 348; Wiggett v. Fox, 11 Exch. R. 832; Dee v. Midland Railway Company, 26 Law Journ. Exch. 171; 3 Law Chron. pp. 130, 155, 321).

IX. *Attorney suing for costs*.—Before an attorney can bring an action on his bill he must have delivered to, or left for, the defendant, a calendar month previously, a signed bill of his costs (6 & 7 Vic. c. 73, s. 37; Pract. Com. L. 381; 1 Law Chron. 408—407; 3 Id. 376).

X. *Notice to quit*.—When there is a tenancy from year to year subsisting, it can only be put an end to by a notice to quit, which may be given by either party, either in the first (Doe v. Smarridge, 9 Jur. 781) or any subsequent year. Except where there is a special agreement to the contrary, or a particular local custom controlling the general rule, the notice must be a half-year's notice. However, where the tenancy commenced at one of the usual quarterly feast-days, the half-year may be computed from one feast-day to another, though there be not 182 days between them (1 W. Black. Rep. 596; Harris. Woodf. Landlord and Tenant, 275, note k;

2 Black. Com. 141, note 1, by Christian; 1 Steph. Com. 271, 1st edit.; p. 278, 2nd edit.). The notice to quit must be given half a year previous to the expiration of the *current year of the tenancy*, so as to expire at the same period of the year as the tenancy from year to year commenced (1 Steph. Com. 271, 1st edit.; p. 278, 2nd edit.; *Right v. Darby*, 1 Term Rep. 159; see *Doe v. Dobell*, 1 Qu. Ben. Rep. 806; S. C. 5 Jur. 434; *Berry v. Lindley*, 9 Man. and Gr. 498; S. C. 5 Jur. 1061; *Doe v. Lines*, 12 Jur. 80). So where it is agreed that a quarter's notice shall be sufficient, the notice must expire with the end of the current year of the tenancy (3 Burr. 1019; 2 Black. Com. 147, n. 3, by Christian; *Doe v. Donovan*, 1 Taunt. 555; *Doe v. Dobell*, 1 Q. B. Rep. 806).

XI. *Judgment after verdict; execution.*—On a verdict, judgment may be signed and execution issued in fourteen days, unless execution be ordered to issue at an earlier or later period (15 & 16 Vic. c. 76, s. 120; Rule, Hil. T. 1853, pl. 57).

XII. *New trial, appeal, notice.*—In all cases of rules to enter a verdict or a nonsuit, upon a point reserved at the trial, if the rule nisi be refused, or granted and then discharged, or made absolute, the party decided against may appeal. So, again, in all cases of motions for a new trial, upon the ground that the judge has not ruled according to law, the party decided against may appeal, provided one of the judge's dissent from the decision of the court, or the court think fit that an appeal should be allowed. No appeal is, however, to be allowed where the application for the new trial is upon matter of discretion only, as on the ground that the verdict is against the weight of evidence (Com. L. Proc. Act, 1854, pl. 34, 35; stated more fully, 3 Law Chron. pp. 386, 387). Notice of appeal must be given, within four days after the decision, to the opposite party, and also to a Master of the Court (Com. L. Proc. Act, 54, pl. 37).

XIII. *Execution against shareholder in joint-stock company.*—By the 7 & 8 Vic. c. 110, s. 66, execution may be issued against a shareholder of a completely registered company on an application for leave to issue it made either to the court or a judge without the necessity for any suggestion, or for a *scire facias*; the party applying must show that due diligence has been used to obtain satisfaction of the judgment by execution against the property and effects of the company (see 3 Law Chron. pp. 50, 54, 226, 264, 307, 325, 379, 380, 400). Somewhat similar provisions apply to the shareholders of other companies under the Clauses Consolidation Act (the 8 & 9 Vic. c. 16, s. 36), but the application is to be made to the court (1 Law Chron. pp. 243, 275, 309, 345, 410; 2 Law Chron. 270; 3 Id. 20).

XIV. *Evidence—Husband and wife.*—Husbands and wives may be witnesses for or against each other, except in proceedings of a criminal nature or for adultery; in no case are they to be compelled to disclose any communication during marriage (16 & 17 Vic. c. 83; Dav. County Court, 68, 2nd edit.; Key, "Com. Law," pp. 116, 117).

XV. *Evidence—Attesting witness.*—An attesting witness must be called (if alive, &c.), where to the validity of the document an attesting witness is necessary (1 Law Chron. pp. 158, 376, 415; 3 Id. 9, 386; Key, "Com. Law," p. 117).

CONVEYANCING (*ante*, p. 5).

I. *Conveyances or transfers of property.*—Real property cannot in general, since the 8 & 9 Vic. c. 106, be conveyed without deed; personal property in general passes by mere delivery of possession (2 Law Stud. Mag. N. S. Supp. p. 132). A freehold estate in possession of real property corporeal of freehold tenure was formerly said to lie in livery only, and was sometimes conveyed by livery of seisin, accompanied by a deed of feoffment, or at least, prior to 8 & 9 Vic. c. 106, by a written memorandum, signed by the vendor (29 Car. 2, c. 3, s. 1); but the conveyance was usually made by deed of lease and release. But now the immediate freehold of lands lies in *grant* also, and may be conveyed accordingly. And a like freehold estate in remainder, or reversion, after an existing estate of freehold, is said to lie in *grant*, and cannot be conveyed without a deed (1 Steph. Com. 171, 474; Watk. Conv. by White, 182). But it would seem that a freehold remainder, or reversion, expectant on an estate for years, may, with the assent of the tenant, be conveyed also by a deed of feoffment and livery (see Burt. Com. pl. 42; *Doe v. Lynes*, 3 Barn. and Cres. 388; 2 Black. Com. 314, 315). A lease for years cannot (except in the case of a lease for a term not exceeding three years from the making, and reserving two-thirds of the annual value as rent) be created, nor can any lease be assigned or (except by operation of law) surrendered where it could not be created without writing, without a deed (29 Car. 2, c. 3, ss. 1, 3; 8 & 9 Vic. c. 106, s. 3). Incorporal hereditaments lie in *grant*, and cannot, in general, be created or conveyed without deed (1 Steph. Com. 474; 2 Id. 54, 1st ed.; *Bird v. Higginson*, 6 Ad. and Ell. 824). Copyholds pass by surrender and admittance (2 Steph. Com. 52, 1st ed.). Equitable interests in real property cannot be created (except in the peculiar case of an equitable mortgage by deposit) or transferred without a writing (29 Car. 2, ss. 7, 9; 1 Steph. Com. 350); but even in the case of legal estates, where there has been a part performance, equity will frequently enforce the con-

tract, although not put into writing (see 1 Sugd. V. and P. 10th ed. 198). A writing is sometimes requisite for the purpose of changing the property in personalty, as in the cases of a sale of goods of the value of £10, where there is neither payment, nor earnest, nor delivery (29 Car. 2, c. 3, s. 17; 19 Geo. 4, c. 14); a bill or note payable to order; a copy-right (12 Jur. 922, as to attestation), or patent right, &c. &c. A voluntary gift of goods unaccompanied by delivery must be evidenced by deed (2 Steph. Com. 102, 1st ed.; p. 41, 2nd ed.; Sharr v. Pilch, 4 Exch. Rep. 478. Certain formalities are required by statute on the grant or assignment of life annuities, or transfer of ships (1 Law Chron. 363—366, 429, 411, 412; 2 Id. 160).

II. *Conveyance not mentioning buildings, mines, &c.*—A conveyance of freehold lands will, if the word "land" be in the deed of conveyance, pass buildings thereon, and minerals and mines thereunder. For it is clear that the word "land" includes not only the face of the earth, but everything under or over it (Shepp. Touchst. 90; 4 Bing. 90; Raine v. Alderson, 1 Arnold, 329). And, therefore, it is said, "if a man grants all his lands, he thereby grants all his mines of metal, and other fossils—his woods, his waters, and his houses, as well as his fields and meadows. By the name of land, which is *nomen generalissimum*, everything terrestrial will pass" (see Co. Litt. 4 a; 2 Black. Com. 18; 1 Burton's Elem. Convey. 3; 1 Ld. Raym. 737; 3 Wilson, 120; Barton's Comp. 1, 214, 216, 232; 1 Steph. Com. 158, 1st edit.; p. 161, 2nd edit.; 2 Law Stud. Mag. N. S. Supp. p. 51). But on a conveyance of copyhold lands, mines do not pass, at least the copyholder has no power to open new mines (2 Steph. Com. 46, 1st edit.; 1 Id. pp. 594, 595, 2nd edit.; Dearden v. Evans, 5 Mee. and Wels. 11; 3 Jur. 705, S.C.; 17 Ves. 282. The dictum in Com. Dig. tit. "Copyholds" (M. 3), that it is not waste for copyholder in fee to dig or open mines, cannot be supported (1 Siderf. 152; 1 P. Will. 406; Doe v. Wilson, 11 East, 56; Lewis v. Brentwate, 2 B. and Adol. 438). It must be borne in mind that one person may have the right to the surface of the land, and another to the soil underneath, and, except by custom, &c., the owner of minerals, &c., underneath, cannot remove them without leaving sufficient support (Hunfries v. Brogden, 15 Jur. 124), and, on the other hand, it has been held that an action of trespass may be maintained against the owner of the surface by the owner of the subsoil for any injury to such subsoil (Cox v. Glue, 12 Jur. 185).

III. *Grant of piece of water.*—By the grant of a piece of water, the water, together with the right of fishery, passes, but not the soil beneath: for the term "water" does not include the land on which

it lies; unless, perhaps, in the case of salt pits or springs, where the interest of each owner is measured by *bullaries* or buckets of brine (Co. Litt. 4 b; 2 Black. Com. 18; Burton's Comp. pl. 550; 1 Siderf. 161; 1 Levinz, 114; 1 Bart. Elem. Convey. 3, 4; 1 Steph. Com. 157, 1st ed.; p. 161, 2nd ed.).

IV. *Barring estates tail.*—It is by virtue of the provisions in the 3 & 4 Will. 4, c. 74, that an estate tail may be barred. The bar is effected by the tenant in tail, with the consent, where there is one, of the protector of the settlement, unless, indeed, the tenant be also entitled to the immediate remainder or reversion in fee. The disentailment is effected by any assurance *inter vivos* by which estates in fee can be effected (3 & 4 Will. 4, c. 74, ss. 15, 22, 34, 40—43; Key, div. "Conveyancing," pp. 35—37; Hay. Conv. 157, 159, 614, 4th edit; 1 Steph. Com. 546).

V. *Emblements—Lessee of tenant for life.*—Where a man has an uncertain estate, as for his own or another's life, or at will, he is entitled, on the determination of his tenancy (if it be not by his own act), to the emblements or profits of his crop. The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profits; but it is otherwise of fruit trees, grass, or the like, which are not planted annually at the expense and labour of the tenant, but are either a permanent or natural profit of the earth (Co. Litt. 55; Graves v. Weld, 5 Barn. and Adol. 105; Davis v. Eyton, 7 Bing. 154; 2 Black. Com. 122; 1 Steph. Com. 242, 269, 1st edit.; pp. 247, 275; Cro. Eliz. 461; Litt. s. 68; 3 Law Stud. Mag. N. S. Supp. p. 28). Emblements can be claimed only in a species of crop which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed; and it seems that where (as in the case of clover) the vegetable is capable of yielding several crops, the tenant *pur autre vie*, having cut one crop, as emblements during the year, is not entitled to emblements of crops cut by the reversioner, more than one year having elapsed from the sowing—(Graves v. Weld, 5 B. and Adol. 105; S. C. 2 Nev. and Man. 725). And till lately, a lessee under a lease from a tenant for life was entitled to emblements, and that not only in those cases where a tenant for life was entitled—namely, where the estate was determined by the acts of God or of the law (2 Black. Com. 122; Com. Dig. tit. "Biens" (G); 1 Steph. Com. 242)—but likewise where the tenancy was determined by the act of the tenant for life (5 Coke's Rep. 116; 2 Black. Com. 122; 1 Steph. Com. 242, 269, 1st edit.). But if the tenant for years himself determined the tenancy by his own act, he was not entitled to emblements (Co. Litt. 55 b; 3 Bart. Elem. Conv. 56; Davis v. Eyton, 7 Bing. 154; S.

C. 4 Moo. and Payne, 820). But now, by the 14 & 15 Vic. c. 25, it is enacted that on the determination of leases or tenancies under a tenant for life, or for other uncertain interests, *instead of claims for emblements* the tenant shall continue to hold and occupy the lands, &c., *until the expiration of the then current year* of his tenancy, and shall then quit. The tenant must pay rent for such period of occupancy to the succeeding landlord or owner. The statute evidently intends to provide only for tenancies where there may be emblements; indeed it is intitled "An Act to Improve the Law of Landlord and Tenant in relation to Emblements, to growing crops seized in execution, and to agricultural tenant's fixtures."

VI. *Jointure and dower*.—Dower is that estate which the law gives the widow for her life in the third part of her husband's lands and tenements. Jointure is where the husband has made a competent provision for the wife, by giving her a life estate, at least, in lands and tenements, to take effect presently after his death, by which she is for ever precluded from claiming her dower (1 Steph. Com. c. 4; Co. Litt. 36 a, 208 a).

VII. *Surrender of lease for renewal after grant of underlease*.—By the 4 Geo. 2, c. 28, s. 6, where a lease, out of which other leases have been derived by way of underlease, is surrendered, it is not necessary that the underlessees should join, as by the effect of that statute the rent and covenants still remain: the new lease is to be good and valid without any surrender of underleases, and such underleases are to continue of equal force as if the original lease had continued (see Burt. pp. 716 n, 1062; Watk. by Merrifield, 513).

VIII. *Proving executor, dying in lifetime of renouncing executor*.—The personal representative of D. would be the proper party to assign the term if he appointed an executor; otherwise administration *de bonis non* of the original testator should be taken out (see Harrison v. Harrison, 10 Jurist, 273; Venables v. East India Company, 12 Jur. 855; where the executor's right is reserved, see Cummins v. Cummins, 3 Jones and Lat. 64; 12 Jur. Dig. 90).

IX. *Mortgages dead, payment of money and reconveyance*.—A mortgage, whilst redeemable, is *personal assets* in equity; therefore, where a mortgagee in fee dies, his heir or devisee will be a *trustee for the executor*. Thus the personal representative really becomes entitled to the land mortgaged, as well as to the money. However, in order to get the legal estate out of the heir or devisee of the mortgagee, it will be necessary, if the heir or devisee is unable or unwilling to join the executors of the mortgagee in executing a reconveyance of the mortgaged estate,

that proceedings should be taken under the Trustee Acts, 1850, 1852 (see 1 Chron. xxxiv.).

X. *Registry of deeds, delay*.—Deeds should be registered immediately, as by delay in so doing a subsequent purchaser, without notice, registering his deed first will be entitled to priority (Sugden's Vend. ch. 16, s. 5; Shepp. Touchst. 116, note by Atherley; 1 Chron. 19—21).

XI. *Title deeds in strangers' hands, expenses of examination*.—The title deeds must be produced for examination at the vendor's known place of residence, or on or in the immediate vicinity of the estate, or in London; though the conditions of sale usually stipulate that the deeds shall be inspected at the vendor's solicitor's place of business, if he has them in his possession. If the deeds are in the hands of a third party, who will not part with the possession of them, the purchaser's solicitor must attend such third party; the expense of the journey, however, in the absence of stipulations to the contrary, will have to be paid by the vendor, as the additional expense thereby occasioned (1 Sugd. Vend. and Purch. 448, 11th edit.; 2 Law Stud. Mag. N. S. Supp. p. 42; Dart's Vend. 225, 2nd edit.; 1 Jarm. Convey. by Sweet, 99).

XII. *Remainders and reversions*.—The difference between a remainder and a reversion is, that a remainder is something limited over to a third person on the creation of an estate less than that which the grantor has, whilst a reversion is that part which remains in the grantor himself, on such a grant of a less estate (2 Black. Com. 175; Co. Litt. 22 b; Watk. Princ. Conv. ch. 16; Noy's Dial. p. 12; Burton's Comp. pl. 28, 29, 30).

XIII. *Bond by two persons not being partners*.—Where two persons, not being partners, are to give their bond to a third person for the payment of a certain sum of money, and it is wished that in the event of the death of one of the obligors, the obligee should have a legal claim upon the deceased obligor's personal representative, the obligation should be several, or joint and several, and not joint merely. For it is holden that in the case of a joint contract by several persons, if one of the parties die, his executor or administrator is at law discharged from all liability, and the survivor or survivors alone can be sued (2 Williams's Executors, 1239, 2nd edit.; Godson v. Good, 2 Marsh. 300; S. C. 6 Taunt. 594; Hamond v. Jethro, 2 Brownlow, 99; 6 Beav. 185; Osborne v. Crosbern, 1 Siderf. 238; Calder v. Rutherford, 3 Brod. and Bing. 302). And in equity the bond cannot be proved, as such, against the assets of the deceased obligor (Richardson v. Horton, 6 Beav. 185; 2 Williams's Executors, 1486, 4th edit.). But if the contract be several, or joint and several, the executor of the deceased contractor may

be sued at law in a separate action (2 Williams's Executors, 1240, 2nd edit.; May v. Woodward, Freem. 248; Hall v. Huffman, 2 Levinz, 228; 3 Merivale, 619).

XIV. *Joint bond by partners*.—At law, the representatives of a deceased partner are not liable to the joint engagements of the firm, whether contracted by bond, bill, note, or otherwise; but all actions thereon must be brought against the surviving partner or partners alone (Litt. Ten. ss. 281, 282, notes). In equity, however, a partnership debt constitutes the several contract of each partner, consequently the joint creditors have a claim upon the assets of every deceased partner for their respective demands (Lane v. Williams, 2 Vernon, 277, 292; Bishop v. Church, 3 Atkyns, 261; Devaynes v. Noble, Slesch's case, 1 Meriv. 563). This equity arises incidentally from the right among the partners themselves to have the assets of the deceased partner applied in discharge of the joint obligations. But the principle, it has been said (Sumner v. Powell, 2 Meriv. 30; 3 Jarman's Convey. by Sweet, 287), extends only to debts contracted by the partners in the course of their joint trade, and not to engagements entered into by them *aliunde*. But in a more recent case (Thorpe v. Jackson, 2 You. and Coll. 553), the restriction of such principle to mere mercantile transactions has been denied (3 Jarman's Convey. by Sweet, 276, 284; 7 Id. 49, 50). It was formerly considered that in order to entitle a joint creditor to come upon the personal representatives of a deceased partner, it should be shown that the surviving partner was insolvent (see 2 Williams on Executors, 1240, 2nd edit. p. 1489, 4th edit.; 1 Meriv. 530; 3 Id. 619; 2 Russ. and Myl. 495; Wilkinson v. Henderson, 1 Myl. and Ke. 582). But it is now (according to the last edition of Williams on Executors, pp. 1488—1486) the general opinion that the joint creditor may resort to the assets of the deceased partner in the first instance.

XV. *One joint obligor a guarantee*.—If one of two joint obligors be merely a guarantee for the other, he should take a counter-bond for his security, or, according to the circumstances of the case, a warrant of attorney to enter up judgment.

EQUITY (*ante*, p. 5).

I. *Equity jurisdiction*.—Some of the ordinary cases in which the Court of Chancery exercises jurisdiction, as distinguished from the courts of law, are as follow:—Enforcing the specific performance of agreements; administering assets for the benefit of creditors or legatees; winding-up partnership accounts; granting injunctions to prevent irreparable mischief, where the machinery of the common law

courts would not suffice (3 Law Chron. 159); enforcing trusts; relieving against penalties and forfeitures; the protection of infants and lunatics, and their property; enforcing the rights of mortgagors and mortgagees; superintending charities; appointment of new trustees; relieving against frauds, accidents, and mistakes, where there is not a clear remedy at law; preserving testimony; enforcing election and satisfaction, &c. (3 Black. Com. 47—56, 426, *et seq.*; 1 Story's Jurispr. c. 1; Bacon's Abr. "Courts of Chancery;" Key, div. "Equity," p. 1—8).

II. *Redeeming mortgage, how, and time*.—Where a mortgagee enters into possession of the mortgaged property, if the mortgagor desires to redeem him, he should file a claim or a bill for redemption. This must be done within twenty years from the time of the mortgagee's entering into possession, or making an acknowledgment of the mortgagor's title, &c. (3 & 4 Will. 4, c. 27, s. 28; Princ. Eq. 296; Baker v. Wetton, 14 Sim. 426; Key, div. "Equity," pp. 32, 33).

III. *Infant or lunatic trustee*.—Where a legal estate is outstanding in an infant or person of unsound mind, as a trustee, the legal estate may be got in under the Trustee Acts, 1850 and 1852, by presenting a petition to the Lord Chancellor or Lords Justices in the case of a lunatic, or to the Court of Chancery, in the case of the infant, whereupon an order will be made either after or without a reference (15 Jur. 69, 187) for an order vesting the legal estate, or directing some person to convey it. The effect of the order is the same as if the trustee had been sane, or of age, and had conveyed to the purport of the order. The order is conclusive evidence of the trustee's incapacity (13 & 14 Vic. c. 60, ss. 3, 7, 44; 3 Law Chron. 126, 128; 1 Id. 303).

IV. *Sales and leases of settled estates*.—The 19 & 20 Vic. c. 120, is the act authorising a sale or lease of settled estates without a special application to Parliament, though there be no power of sale or leasing in the settlement (see 3 Law Chron. pp. 105, 111, 169, 209, 214, 286).

V. *Sales and leases of settled estates*.—The circumstances in which the Court of Chancery is, by the 19 & 20 Vic. c. 120, authorised to exercise jurisdiction, are the following: Where leases or sales of the settled estates would be proper and consistent, with a due regard to the interests of all parties entitled under the settlement. Power is also given to the court to grant leases where it is deemed expedient that persons in possession of land, for certain limited interests, should have power to grant agricultural or occupation leases at rack rent. The application to the court is by petition, after the presentation of which directions are given in chambers as to ad-

vertisements; any person may apply to the court by motion for leave to oppose the application (3 Law Chron. 105, 169).

VI. *Evidence, how adduced.*—The practice of taking evidence in equity by interrogatories is abolished, except that the court may order any particular witness or witnesses to be so examined. In the absence of such direction the evidence is taken either by affidavits or by oral examination before examiners (15 & 16 Vic. c. 86, ss. 28, 29). Since this act, the orders of the 13th of January, 1855, have directed that when issue is joined, the plaintiffs and defendants respectively shall be at liberty to verify their respective cases, either wholly or partially by affidavits, or wholly or partially by the oral examination of witnesses, without any notice being given (see 1 Law Chron. 337, 338; 2 Id. 372, 392).

VII. *Affidavit, knowledge and information.*—Affidavits must distinguish facts within the knowledge of the deponent from those by information; the means of knowledge, or source of information, should be stated (Order of 13 Jan., 1855, pl. 8, stated in 1 Law Chron. p. 338).

VIII. *Answer without interrogatories.*—Where a defendant is not required to answer a bill, he may, nevertheless, put in an answer, but this must be done within twelve days after appearance, excluding the day of appearance (15 & 16 Vic. c. 86, s. 13; 11th Ord. of May, 1845; 16th Id., Art. 10).

IX. *Defendant not interrogated and not answering.*—Where a defendant not interrogated does not put in a voluntary answer, he is to be considered as having traversed the case made by the plaintiff's bill (15 & 16 Vic. c. 86, s. 26; *Heath v. Lewis*, 2 Week. Rep. 488). As the defendant is to be considered as having denied the allegations in the bill, the plaintiff must, of course, be prepared on the hearing to support his case by evidence, so that he loses the benefit of any admissions which the defendant might have made by his answer.

X. *Feme covert, equity to settlement—Amount.*—Where less than the principal sum of £200, or less than the annual sum of £10, is payable to a married woman out of a fund under the control of the Court of Chancery, her consent to its payment to her husband will be dispensed with; in other words, she has in such cases no right to elect whether the amount shall be paid to her husband or be made the subject of settlement (see further, 3 Law Chron. pp. 34, 39, 136, 285, 286). Though the above is the rule stated in the text-books, yet in one case the Master of the Rolls ordered a settlement on the wife where the fund was less than £200—being, in fact, £140 only—but there was the special circumstance that the husband had deserted the wife (*Cutler's Trusts*,

15 Jur. 911; overruling *Foden v. Finney*, 4 Russ. 428).

XI. *Feme covert, money paid to husband, proceedings.*—Where a married woman is entitled to money out of a fund in court, she must, if in town, appear in court to be examined by the judge apart from her husband; if in the country, and she is unwilling to come to town, an order on petition or motion must be obtained for such examination before commissioners. The examination is taken down and signed by the married woman and the commissioners; and on applying to have the money paid out, the signatures of the parties must be verified (1 Newland's Prac. 383, 384; 1 Daniell, 95, 2nd edit.; 1 Ves. and Beam. 507).

XII. *Indemnity to executor without suit.*—By the 13 & 14 Vic. c. 35 (Sir George Turner's Act) the executors or administrators of a deceased person may obtain an order, on motion or petition of course, to refer it to one of the masters of the court to take an account of the debts and liabilities affecting the personal estate of such deceased party, and to report thereon. When the debts and present liabilities reported are paid, and the contingent liabilities reported are provided for by appropriation of sufficient moneys to answer such liabilities, the executors or administrators are protected as under a decree obtained on a regular administration suit (see 2 Law Stud. Mag. N. S. pp. 230, 231).

XIII. *Appointment of guardian by father.*—A father may appoint a guardian to his children by his will duly executed or by deed. The powers and duties of such guardian extend to the custody of the persons of the children, to the management and receipt of the rents, &c., of the real estate and of the personal estate (2 Steph. Com. 304, note, 3rd edit.).

XIV. *Guardian, appointment in Chancery.*—Where no guardian has been appointed to an infant, formerly a petition might have been presented to the Court of Chancery, but now an application may be made at chambers for the appointment of guardian, and the allowance of a proper maintenance (*Whitworth*, 515; re *Christie*, 9 Sim. 648).

XV. *Trustees, relief in a summary manner.*—The 10 & 11 Vic. c. 96 (amended by the 12 & 13 Vic. c. 74, and regulated by the order of the 10th of June, 1848), enables trustees (including executors and administrators) having in their hands any trust moneys, on filing an affidavit entitled in the matter of the trust, and containing the particulars mentioned in the orders, to pay the money, with the privity of the Accountant-General in Chancery, into the Bank of England to the account of the Accountant-General in the matter of the particular trust. The same power is given to transfer or deposit annuities, or stocks standing in the trustees' names in the books

of the Bank of England, the East India Company, South Sea Company, or any Government or Parliamentary securities standing in such trustees' names, or in the names of any deceased person of whom they shall be the personal representatives. Where there are several trustees, the *major* part of them may proceed under the act. So soon as the payment, transfer, or deposit is made, notice thereof is to be given to the parties named in the affidavit, as being interested in, or entitled to, the fund. The parties entitled may apply by petition (on notice to the trustees) respecting the investment, payment out, or distribution, &c., of the fund. The judge may, where it shall appear that the trust funds cannot be otherwise safely distributed, order the institution of a suit or suits. The receipt by the proper officers for the cash, or of the transfer or deposit, is a sufficient discharge to the trustee for the money so paid, or the stock or securities so deposited or transferred (see *Princ. Eq.* 281, 282; 2 *Chron.* 161, 300, 373; 3 *Id.* 184, 286, 317; 12 *Jur.* pt. 2, p. 241, 249, 345; 14 *Jur.* 52). Where the trust fund is paid into court, a bill cannot be filed by a *cestui que trust*: he must petition (*Goode v. West*, 15 *Jur.* 1025).

BANKRUPTCY (*ante*, p. 6).

I. *Principle of bankruptcy laws — Relief.*—The principle of the bankruptcy laws is to compel the dishonest, and enable the honest trader, who is not able to pay all his creditors, to give up his property for equal distribution (with certain privileged exceptions) among his creditors, instead of allowing any individual creditor to proceed to obtain payment of his demand, without reference to there being sufficient for the other creditors; and upon such bankruptcy to discharge the debtor, both in body and estate, from all his debts, and so enable him to begin the world again without any incumbrance.

II. *Requisites of bankruptcy.*—In order to constitute a bankruptcy, there must be (1) a trading; (2) an act of bankruptcy; (3) a petitioning creditor's debt to a sufficient amount, unless where the trader himself petitions (2 *Chron.* 213).

III.—*Traders, who.*—The Bankruptcy Consolidation Act contains an enumeration of traders liable to become bankrupt (see *Key*, div. "Bankruptcy," 18); but besides these, the following traders have been deemed by the courts to be liable to become bankrupts: namely, bakers, distillers, fishermen, goldsmiths, lodging-house keepers, milkmen, newsmen, scavengers, shoemakers, tailors, &c. (see *Mont* and *Ayrt.* *Bankr. Pract.* ch. 1; *Comyns' Dig.* tit. *Bankrupt*). These trades not being enumerated in the statute, there must, in order to support an adjudication, be proof of a *buying and selling*. There must, in such cases, be sufficient evidence to support

the inference of an intention to deal generally; but the *quantum* of the dealing is immaterial (see *Henley's Bankr. Law*, p. 3, 3rd edit). A few illustrations will make this clearer. If a man buy *horses* to sell again, with a view to profit, he is liable to be a bankrupt; but if he sell only such as he bred and reared himself, he is not (*Exp. Gibbs*, 2 *Rose*, 88; *Wright v. Bird*, 1 *Price*, 20). If a *butcher* buy sheep or cattle, kill and sell them, with a view to profit, he is liable to be a bankrupt; but if he kill and sell only such as he bred and reared himself, he is not (*Dally v. Smith*, 4 *Burr.* 2148). If a *fisherman* be in the habit of purchasing fish from others to sell again, with a view to profit, he is liable to be a bankrupt; but if he sell only such fish as have been caught by him, he is not (*Heaney v. Birch*, 3 *Camp.* 233). Persons who purchase *coals* to sell again, with a view to profit, are liable to be made bankrupts; but if they sell only such as they procure from their own mines, they are not (*Port v. Turton*, 2 *Wilson*, 169). So if a person who owns or rents a *mine*, work it, and sell the ore, &c., he is not thereby subject to the bankrupt laws; for although he sells, he does not buy; &c., same of a person who sells *stones* taken from his own *quarry* (*Exp. Gardner*, 1 *Rose*, 377; *S. C.* 1 *Ves.* and *Beam.* 45). If a man buy *milk* to sell it again, with a view to profit, he is liable to be a bankrupt; but if he sell the milk only which he procures from his own cows, even although he occasionally sells the cows when they are no longer fit for that purpose, he is not (*Carter v. Dean*, 1 *Swanst.* 64; see *exp. Dering*, 1 *De Gex.* 398). So if a man buy *cheese* or *cider*, to sell again, with a view to profit, he is liable to be a bankrupt; but if he sell only the cheese which he has made from the milk of his own cows, or the cider which he makes from the fruit of his own trees, he is not (1 *Term Rep.* 34). So, buying and selling Government stock, or other public stocks or securities, does not render a man liable to be made a bankrupt, because they are not "goods or commodities" within the meaning of this clause of the statute (*Colt v. Netterville*, 2 *P. Will.* 308). Nor will the buying and selling land, or any interest therein, make a man liable to be a bankrupt, for the same reason (see *Port v. Turton*, 2 *Wilson*, 169). Where a professor of music published a book incidental to his profession on his own account, it was held not to constitute him a trader (*re Whittle*, 18 *Law Times*, 10).

IV. *Traders, principles.*—The principle which determines whether a person is a trader within the meaning of the Bankrupt Acts, in respect of the extent of his trading, is his intention or not to deal generally, and not the extent or quantity of his dealings. For though, in general, one single act of buying and selling will not make a man such a

trader, without proof of his intention to continue such a course of dealing, yet trading, in a very small degree, will sustain a fiat, if there is an intention to deal generally (2 Black. Com. 476; exp. Lavender, 4 Deac. and Ch. 484; exp. Moule, 14 Ves. 602; Doe v. Lawrence, 2 Car. and Pay. 135). Lord Henley (Henley's Bankr. p. 3, 3rd edit.), says: "The general description of a trader cannot be satisfied without there being both a buying and selling; which it is said are implied from the words 'using the trade of merchandise;' a merchant being so denominated from his being a buyer to sell again. It is now settled, in opposition to the early decisions, that the *quantum of the dealing* is immaterial. If there be sufficient evidence to support the inference of an intention to deal generally, a very small degree of actual trading will be sufficient."

V. & VI. *Acts of bankruptcy, voluntary and passive; intention or not to defeat, &c., creditors.*—There is, in point of fact, no distinction made in the law between acts of bankruptcy voluntary and such as are passive. It was formerly considered a voluntary act of bankruptcy to file a duly attested declaration of insolvency (3 Jur. N. S. 550). So, the filing a petition for an arrangement. The following (among others) may also be considered voluntary—namely, 1, a trader's departing from his dwelling-house, or the realm, or otherwise absenting himself; 2, his beginning to keep house or remaining abroad; 3, procuring or suffering himself to be arrested, or taken in execution; 5, making a fraudulent conveyance, gift, &c., of his lands, goods, or chattels. The preceding acts must be done with intent to defeat or delay creditors (2 Steph. Com. 139, 2nd edit.); but the following do not depend upon proof of intention: 6, so, lying in prison for twenty-one days or escaping or filing a petition in the Insolvent Debtors' Court, or making a private arrangement with the petitioning creditor after docket struck, are acts of bankruptcy. The principal act of bankruptcy of a passive nature arises from the debtor not paying, &c., after being summoned in the Court of Bankruptcy to make payment or give security, &c.

VII. *Bankruptcy of member of Parliament.*—A member of Parliament may, after service of summons and default as hereafter mentioned, be bankrupt, and the proceedings after such default may be the same as against any other bankrupt, except that he cannot be imprisoned during the time of privilege, except in cases made a felony or misdemeanor by the bankrupt laws (12 & 13 Vic. c. 106, ss. 66; 1 Atk. 197; Mont. and Ayr. Prac. 507). It is an act of bankruptcy in a member of Parliament, being a trader, if, on being served with a summons in an action for the recovery of a debt (verified by affidavit duly filed) of such amount as shall be suffi-

cient to support a petition for adjudication, he do not, within one calendar month, pay, secure, or compound for such debt, or enter into a bond with two sureties for payment of the debt and costs (if recovered), and within one month after service of the summons enter an appearance.

VIII. *Facts and steps prior to petitioning for adjudication.*—Before a creditor files a petition for adjudication, his solicitor should satisfy himself on the following points:—1, that no previous petition has been filed, or if filed, that it has not been acted on within seventeen days or any enlarged time (sec. 96); 2, that the debtor is not an uncertified bankrupt; 3, that the person against whom the petition for adjudication is proposed to be issued is a trader within the meaning of the bankrupt laws; 4, that an act of bankruptcy has been committed; 5, that the debt owing to the petitioning creditor is, in nature and amount, sufficient to support the petition.

IX. *Joint-stock company, adjudication against.*—In order to obtain an adjudication of bankruptcy against a joint-stock company, a creditor not having a judgment, &c., must (7 & 8 Vic. c. 111, s. 7) file an affidavit of debt, of a proper amount, in a court of law, and sue out a writ of summons, which must be served on the chief clerk, &c., of the company. If the company do not, within one calendar month, pay, &c., such debt, or make it appear to a judge that it is their intention to defend the action upon the merits, and enter an appearance accordingly, the company will be deemed to have committed an act of bankruptcy (see exp. Gillett, 28 Law Tim. Rep. 68, 53; 3 Law Chron. 187, 193, 254, 267, 383). By ss. 5 and 6, creditors having a judgment or decree, &c., may serve a fourteen days' notice requiring payment. So by s. 4, the company itself may resolve that it is unable to meet its engagements, and that shall be an act of bankruptcy.

X. *Petitioning creditor, affidavit.*—The petitioning creditor does not make any affidavit of debt, but he verifies by affidavit in general terms the allegations of his petition, and among these allegations is one that the bankrupt is indebted to him in a certain amount: no particulars of the debt are necessary to be stated (1 Law Chron. p. 322).

XI. *Proof of debts.*—Creditors living near the court prove their debts by oath before the commissioner (or registrar for that purpose appointed). If a creditor live remote from the place of the meeting of the commissioners, he may prove by affidavit, sworn before a person authorised to administer an oath in bankruptcy matters. It has been held that though the 164th section of the Consolidation Act does not provide for proof by affidavit, and there is no express provision in the act dispensing with

personal attendance, creditors in the country may prove by affidavit (2 Law Stud. Mag. N: S. p. 4). Debts may be proved at the two public meetings appointed by the commissioners for the bankrupt to surrender and conform, or at any adjourned meeting, and likewise at every other meeting appointed by them for proof of debts, whereof ten days' notice shall have been given in the *Gazette*. The proof may also be made at any dividend meeting, and likewise at a meeting called at the creditors' expense for such proof. By sec. 28 of the Consolidation Act, the commissioner may direct a registrar to take proof of debt (12 & 13 Vic. c. 106, s. 164; Mont. and Ayr. Bankr. Prac. c. 12, s. 1). To entitle a creditor to a dividend, or even to prove, he must give up any securities he may hold, given by the bankrupt alone, or must first realise them, if so entitled, and prove for the residue.

XII. Distinction between mortgages of land and of personal property.—The only distinction we are aware of, so far as the question is concerned, is relative to the doctrine of reputed ownership, which does not apply to real estate, but does to personal property; in reference to the latter of which we may observe, that although a mortgage of chattels personal made *bona fide* and for a valuable consideration, but the possession of which is retained by the assignor, will be valid against creditors under the 13 Eliz. c. 5, if it can be shown that the possession is consistent with the nature of the transaction, so that the presumption of fraud raised by the possession is rebutted, yet it may be void under the bankruptcy statutes as against the assignees of the bankrupt continuing to be the reputed owner, unless it can be shown that possession has been given as far as circumstances would permit (Coote's Mortgages, 248, 3rd edit.; Halker v. Burnell, Doug. 817; Load v. Green, 15 Mees and W. 216; Gale v. Lewis, 16 Law Journ. Q. B. 119).

XIII.—Leave to bring action, suit, &c.—Before commencing an action or suit, or referring to arbitration, the assignees should, for their own security, obtain the leave of the commissioner; but such leave is not indispensable (3 Law Chron. p. 397; alter Key, "Bankruptcy," p. 62, which was framed under the supposition that the language of the statute had effected an alteration in the practice).

XIV. Reputed ownership.—In order that goods should be in the possession, order, or disposition of a bankrupt, &c., within the 12 & 13 Vic. c. 106, s. 125 (which enacts that, "if any bankrupt at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sole alteration or disposition as owner,

the court [the commissioner] shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy"), two things are required—first, they must be in his possession under such circumstances as to render him reputed owner of the goods; secondly, they must have been left in his possession through some impropriety or laches of the true owner, under circumstances calculated to enable the bankrupt to obtain a false credit by inducing the world to look on him as the true owner (in accordance with the judgment of Lord Redesdale in *Joy v. Campbell*, 1 Sch. and Lef. 328). The question whether goods are in the possession, order, and disposition of a bankrupt may depend on the usage of some particular trade, which may vary at different times and places. When property is left by the true owner in a shop where goods are notoriously left by parties for other purposes than for sale (as clocks with a clockmaker), the proprietor of the shop is not a reputed owner of them within that statute (*Hamilton v. Bell*, 18 Jur. 1109; see also 1 Chron. pp. 68, 76, 132, 384, 441, 458; 2 Id. 58; 3 Id. 17, 37, 187, 333, 392).

XV. Composition.—A bankruptcy opened may be stayed after the bankrupt has passed his last examination, if nine-tenths in number and value of the creditors assembled at two advertised meetings will agree to accept a composition. Upon the acceptance of such offer being testified to the court in writing, it may annul the adjudication, and dismiss the petition for adjudication. All the creditors are bound to accept the agreed composition (12 & 13 Vic. c. 106, s. 280). There is no other jurisdiction to annul with consent of creditors, but if every creditor consents, such an order will be made *quantum valeat* (exp. Luxford, 1 Fonbl. N. R. 261; exp. Harris, Id. 262).

CRIMINAL LAW (*ante*, p. 6).

I. Criminal courts—Supreme coroner.—The only one of the superior courts at Westminster having jurisdiction in criminal matters is the Court of Queen's Bench (4 Bl. Com. 265; first book, 467, 468). The Chief Justice of the Queen's Bench is the supreme coroner of the realm (4 Steph. Com. 355, 2nd edit.; Key, "Crim. Law," 2).

II. Central Criminal Court.—By the 4 & 5 Will. 4, c. 36, a new court was established for the trial of offences in London, Middlesex, and certain suburban parts of Essex, Kent, and Surrey, to be called the Central Criminal Court. And it is provided (s. 2), that the Crown may issue its commission of oyer and terminer, and gaol delivery to such court, and that the judges of the court (which include the Lord Mayor of London, the judge of the Admiralty, the common law judges, and certain others), or any two

or more of them, shall hold a session for London and Middlesex, and the parts of Essex, Kent, and Surrey, before mentioned, in the City of London or suburbs thereof, at least twelve times in every year (and oftener if need be), such times to be fixed by general orders of the said court, which any eight or more of the said judges of the courts of Westminster are empowered from time to time to make. (see the 14 & 15 Vic. c. 55, s. 13, repealing prohibition in 4 & 5 Will. 4, c. 36, as to trial of offences at sessions within jurisdiction of Central Criminal Court).

III. *Quarter sessions, jurisdiction.*—The quarter sessions had jurisdiction to try all felonies and all misdemeanors, except perjury and forgery, at the common law; but in capital felonies it was not usual to proceed at the sessions. And now, by the 5 & 6 Vic. c. 38, s. 31, neither the justices of the peace acting in and for any county, riding, &c., nor the recorder of any borough, shall, at the session of the peace, try any person or persons for any treason, murder, or capital felony, or for any felony which, when committed by a person not previously convicted of felony, is punishable by transportation beyond the seas for life, or for any of the following offences:—1. Misprision of treason. 2. Offences against the Queen's title, &c., or against either House of Parliament. 3. Offences subject to the penalties of premunire. 4. Blasphemy, and offences against religion. 5. Administering or taking unlawful oaths. 6. Perjury, or subornation of perjury. 7. Making, or suborning any other person to make, a false oath, affirmation, or declaration, punishable as perjury, or as a misdemeanor. 8. Forgery. 9. Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorze, furze, or fern. 10. Bigamy, and offences against the laws relating to marriage. 11. Abduction of women and girls. 12. Endeavouring to conceal the birth of a child. 13. Offences against any provision of the laws relating to bankrupts and insolvents. 14. Composing, printing, or publishing blasphemous, seditious, or defamatory libels. 15. Bribery. 16. Unlawful combinations and conspiracies, except over which such justice or recorder respectively have or has jurisdiction to try, when committed by one person. 17. Stealing, or fraudulently taking, or injuring, or destroying records or documents belonging to any court of law or equity, or relating to any proceeding therein. 18. Stealing, or fraudulently destroying or concealing, any wills or testamentary papers, or any document or written instrument being, or containing, evidence of the title to any real estate, or any interest in lands, &c. Some other statutes also provide that the offences to which they relate shall not be tried at the session.

IV. *Petty sessions, jurisdiction.*—Courts of petty, or petit, sessions are formed by the periodical, as well as occasional meetings of the justices of the peace, acting within certain divisions or districts, into which every county is divided; and also of those appointed for certain boroughs. And the court of petty sessions thus formed is also called a bench of magistrates. County magistrates generally hold their courts of petty sessions at the most important or central town of the division, either at one of the principal inns, or at the town-hall, if there should happen to be one. But a petty session may be held by any two justices on their mere *private agreement*, for the purpose of acting either ministerially or judicially in any cases within their authority. The subjects usually brought before petty sessions are either of a strictly criminal nature or of a *quasi civil* nature. The former sort are those which in most cases a single magistrate is competent to adjudicate on, but it is thought advisable not to act alone; of the latter sort are the recovery of servants' wages, and other proceedings relative to servants; the recovery of parochial rates and tithes; appeals against poor rates; the removal of paupers; proceedings in bastardy; recovery of possession of deserted premises, and in the cases of fraudulent removals to avoid distresses; ale-house licences, and proceedings as to highways and turnpike roads, &c.

V. *Indictable offences, division—Civil injuries.*—Indictable offences or crimes are usually divided into misdemeanors and felonies (see Key "Crim. Law," p. 14; 4 Steph. Com. 57). Crimes and misdemeanors differ from civil injuries inasmuch as they concern the community at large, and the offence is one not against a private right merely, but against society in its aggregate capacity. A civil injury is a wrong against an individual considered merely as such (4 Steph. Com. 80, 2nd edit.).

VI. *Felony.*—Felony is a generic term, comprising thereunder petit treason (before its abolition, and, indeed, anciently even high treason, Co. Litt. 391 a; 4 Black. Com. 94), homicide (including thereunder murder, manslaughter, death by chance, *se defendendo*, or for justifiable cause, Com. Dig. tit. "Justices," M. 1), burglary, robbery, arson, rape, and larceny (Co. Litt. 391 a). But felony has a more restricted meaning, and, as distinguished from a misdemeanor, may be stated as a crime which induces a forfeiture and a punishment (though not necessarily a capital one) of a high degree (see hereon 4 Steph. Com. 57—61, 1st edit.). A misdemeanor is a crime not amounting to a felony. The term "misdemeanor" is, indeed, properly speaking, synonymous with that of "crime," though in common usage it is used to denote such crimes as do not

amount to felonies (4 Steph. Com. 57, 131, 1st edit.).

VII. Perjury at Common Law.—Perjury at the common law is the crime of false swearing which arises when a lawful oath is administered in some judicial proceeding to a person who swears wilfully, absolutely, and falsely, in a matter material to the issue or point in question (4 Black. Com. 187; Key, "Crim. Law," 49).

VIII. Perjury, witnesses.—In order to obtain a conviction for perjury, two witnesses are necessary (4 Black. Com. 358; Archb. Crim. Plead. and Evid. 155, 568, 8th edit.). However, it will be sufficient that the perjury be directly proved by one witness, and corroborative evidence on some particular point be given by another (vide *R. v. Mayhew*, 6 Car. and P. 315; *R. v. Yates*, ib. 132; *R. v. Parker*, 1 Car. and M. 639; *Reg. v. Roberts*, 2 Car. and Kirw. 607); and where the alleged perjury consists in the defendant's having contradicted what he himself swore on a former occasion, the testimony of a single witness in support of the defendant's own original statement will support a conviction (*R. v. Harris*, 5 B. and Ald. 929; but see *contra*, *Reg. v. Wheatland*, 8 Car. and Pay. 238, per Gurney, B.).

IX. Perjury, subornation.—Subornation of perjury is the offence of procuring another to take such a false oath as constitutes perjury in the principal. The oath must be actually taken, otherwise the person inciting thereto is not guilty of subornation of perjury (1 Hawk. Pl. C. c. 69, s. 10; 4 Bl. Com. 138).

X. Proceedings prior to trial.—The first proceeding against a person accused of an offence in order to bring him to trial is to summon, or in serious cases to arrest the party and bring him before a justice; the party is then either discharged or remanded from time to time for any period not exceeding eight days, or committed for trial, in which latter case he is committed to prison or discharged on bail, and the parties are bound over to prosecute. The bailment and depositions are then certified to the proper officer (11 & 12 Vic. c. 42; 3 Law Chron. 394). The following is a condensed statement by Mr. Oke of the various steps in the procedure on the preliminary inquiry:—1. Prosecutor's attorney to open case. 2. Depositions of prosecutor's witnesses taken. 3. Accused invited, at the close of each witness's examination, to put questions to the witness, such cross-examination being distinguished in the deposition from the examination in chief. 4. When case for prosecution completed, depositions read over to and signed by the witnesses. 5. Attorney of accused to address the bench if case for prosecution completed; or, if

not completed and remand intended, to state his objection to a remand. 6. If evidence insufficient, accused discharged. 7. If evidence incomplete, accused remanded or bailed till a future day. 8. If evidence sufficient and case completed, depositions read, and magistrate's clerk to inform the accused of the precise legal charge against him. 9. Justice to caution accused as required by s. 18. 10. Accused's statement to be taken down and read over to him. 11. Accused's witnesses (if any) heard, and their depositions taken. 12. If accused calls witnesses, prosecutor's attorney to cross-examine them. 13. Committal of accused for trial, or bailing or consenting to bail him; if two or more charges preferred. 14. Binding over parties to prosecute. 15. Allowing expenses of witnesses. Then, or instead of these proceedings (which course, however, is not generally approved), the prosecutor may prefer his bill before the grand jury. If the bill be found, the party is called on to plead, which he does, and is then tried, unless under the 14 & 15 Vic. c. 100, s. 27, the trial is adjourned to a subsequent session.

XI. Bail, felony, justices.—One justice may admit to bail persons accused of felony (11 & 12 Vic. c. 42, s. 23; Key, "Criminal Law," 85, 86; 3 Law Chron. 194, 394).

XII. Bail, Queen's Bench, judge in vacation.—The Queen's Bench, or a judge in vacation, may admit a prisoner to bail in cases where a magistrate having power declines to exercise it, or where he has no power, as in treason (4 Steph. Com. 395, 2nd edit.; 11 & 12 Vic. c. 42; Key, "Crim. Law," 86, 87).

XIII. Indictment, nature, preferring, material parts.—An indictment is a written accusation at the suit of the Queen against a party of some crime or misdemeanor, presented on oath by a grand jury, and upon which, if found by them, the party is eventually tried (4 Steph. Com. 398; First Book, 424). A party may be tried on an indictment founded on a coroner's inquisition without a finding by a grand jury (2 Hale, 61; 1 Salk. 382). The following are the usual parts of an indictment (though, by some recent statutes hereafter noticed, defects may be amended, and some of the enumerated particulars are not essentially necessary):—1. A proper venue, in the margin, and even in the body, where local description necessary (14 & 15 Vic. c. 100, s. 23). 2. Certainty in the name and description of the party indicted, and of the party against whom the offence was committed: also, as to time and place, and the facts. 3. The offence must be properly and technically described. 4. The value of the thing which is the subject or instrument of the offence must sometimes be expressed; but in general this is now unnecessary (see First Book, 424, 425; 3 Law

Chron. 395). 5. The indictment must have a proper conclusion; but a want of this is not now fatal, by s. 24, of the 14 & 15 Vic. c. 100, which also cures other defects in indictments, particularly as to names places, and times, &c. (see 1 Chit. Crim. Law, 169—304; 4 Steph. Com. 374—377).

XIV. *Criminal information*.—A criminal information is a mode of proceeding in respect of a *misdemeanor* upon leave first obtained from the Court of Queen's Bench, and no finding by a grand jury is requisite (see 4 Steph. Com. 409, 412, 2nd edit.; 4 Bacon's Abr. 402, *et seq.*, 7th edit.).

XV. *Criminal information, conditions*.—By the 4 & 5 Will. and Mary, c. 18, it is required that every prosecutor, who is permitted to promote such an information, shall give security by a recognisance of £20, to prosecute the same with effect, and also to pay costs to the defendant in case he shall be acquitted, unless the judge who tries the information shall certify that there was reasonable cause for filing it. In addition, the prosecutor waives his civil action (2 Burr. 719; 11 Jur. 377).

NEW COMMON LAW RULES.

EASTER TERM.

Indorsement of notice on writs on contract—Entry of satisfaction on judgments.

We find we omitted to notice the common law rules of Easter Term last, with respect to the indorsement of notice on writs of summons where the debt is under £20, to entitle the plaintiff to apply for costs where judgment is signed by default, and as to the entry of satisfaction on judgments. The former one is of general practical importance, and should be attended to by practitioners, and the examiners will doubtless soon call the attention of articulated clerks to it.

Indorsement of Notice on Writs on Contract.

It is ordered that plaintiffs suing in contract for £20 or less may, if they claim costs, indorse on the writ of summons the following notice:—

"Take notice, that if judgment be signed for default of appearance, the plaintiff will, without summons, apply to a judge for his costs of suit, unless before such judgment you shall give notice to him or his attorney that you intend to oppose such application."

And it is further ordered that, if the defendant give such notice, the plaintiff shall proceed by summons and order. But if the defendant give no such notice, the plaintiff may produce such indorsement to a judge at chambers for an order for costs *ex parte*; and if the judge shall sign his name to the indorsement, such signature shall be an order for costs, and the Master may tax them thereon, accordingly. In

case of any application for costs without such indorsement, the plaintiff shall not be entitled to more costs than if he had made such indorsement, unless a judge shall otherwise order.

Entry of Satisfaction on Judgments.

Upon a satisfaction piece, duly signed and attested, in accordance with the 80th rule of Hilary Term, 1853, being presented to the Clerk of the Judgments of the Masters in the court in which the judgment has been signed, he shall file the same, and enter satisfaction in the judgment-book against the entry of the said judgment; and no roll shall be required to be carried in for the purpose of entering satisfaction on a judgment.

SUMMARY OF DECISIONS.

EQUITY AND CONVEYANCING.

ADMINISTRATION SUIT.—*Account—Lapse of time, effect of—Laches—Demurrer—Right to account and to administration of fund, distinction between—Presumption of assets and of due administration.*—

The rule laid down in *Pickering v. Lord Stamford* (2 Ves. Jun. 272, 581), is perfectly consistent with the principle of the Statute of Limitations, and the doctrine of laches in the Court of Chancery. If a trustee says he has a trust-fund in his hands, then he is within the principle which is laid down in the Statute of Limitations as to land held upon trust, as to which it is never too late to raise the question until there has been an alienation for value. So it is never too late to come, with respect to a trust-fund which a person admits having in his hands. But it has been held in the following case, that lapse of time will bar the right of the next of kin of an intestate to an account against the administrator. There is a distinction between the right to an account and the right to the administration of a fund admitted to be in hand. In the absence of any averment in the bill, the court will not, upon demurrer, assume that assets have come to the hands of an administrator without assuming also that they have been duly administered. *Kohler v. Reynolds*, 26 Law Journ. Ch. 415.

APPORTIONMENT.—*Rent* [vol. 3, p. 389]—

4 & 5 Wm. 4, c. 22—*Interest not determinable by death*

—*Tenant for life with reversion in fee.*—By the 4 &

5 Will. 4, c. 22, s. 2, it is enacted, "that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments, as aforesaid, or in the estate, fund, office, or benefice from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his

or her executors, administrators, or assigns shall be entitled to a proportion of such rents." On this provision, Wigram, V. C., in the case of *Brown v. Amyot* (3 Hare, 173), said that it appeared to him that the death of the person interested—the event on which the apportionment was to take place—must be understood as a death occasioning the determination of the interest, and that this was the necessary effect of the immediate context—"determination by any other means." This case has been acted on in the following decision:—Under the will of A. B., which contained limitations to several tenants for life in succession, with a reversion to the right heirs of A. B., C. D. became tenant for life, with the immediate reversion in fee expectant upon his death without issue. C. D. died without leaving issue: Held, following *Brown v. Amyot* (3 Hare, 173), that the interest of C. D. not having determined by his death, the statute 4 & 5 Wm. 4, c. 22, was not applicable, and that the rent accrued due after his death went to his real representatives, without apportionment. *Re Clulow*, 5 Week. Rep. 544.

DISCOVERY [vol. 3, p. 297].—*Where compulsory reference under the Common Law Procedure Act* [vol. 3, pp. 22, 225, 386].—*Demurrer—Distinction between compulsory and voluntary arbitration.*—By the 3rd section of the Common Law Procedure Act (17 & 18 Vic. c. 125) it is provided that, "if it be made appear, at any time after the issuing of the writ, to the satisfaction of the court, or a judge upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account, which cannot conveniently be tried in the ordinary way, it shall be lawful for such court or judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the court, or, in country causes, to the judge of any county court upon such terms, as to costs and otherwise, as such court or judge shall think reasonable; and the decision or order of such court or judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred." A company employed persons to build a ship, and from time to time made them payments. When the ship was built, the company, asserting that the builders had been overpaid, brought an action to recover the money which they alleged they had paid in excess, and by mistake. The court in which the action was brought directed, under the Common Law Procedure Act, that, as to certain questions between the parties, a special case should be prepared, and that, as to items in dispute, a compulsory arbitration should decide it. The company filed a

bill of discovery, in aid of their case, before the arbitrator. Upon demurrer: Held, that the general principles of equity relating to discovery, applicable to arbitrations, did not apply to a compulsory arbitration, which was to be deemed a mere delegation of the powers of the superior court, and, as such, entitled to be aided by discovery. *British Empire Shipping Company (Limited) v. Somes*, 29 Law Tim. Rep. 178.

INFANT [vol. 1, pp. 9, 342].—*Maintenance—Apprentice fee—Trustee—Contingent interest—Right to retain.*—Where a trustee, or even a stranger, makes an advance for the preferment of an infant presumptively entitled to a fund, upon an understanding as to the latter that he is to be repaid out of the fund on its becoming vested, a court of equity will, if it considers the advance *bona fide* and advantageous, order it to be paid. A. B., after his brother's bankruptcy, took the brother's children into his family, and maintained them, after A. B.'s decease: Held, that his widow and executrix could not retain the sums expended for maintenance out of a legacy given to the children by their grandfather: Held, also, that she could retain the premium paid by A. B. to apprentice one of his nephews out of the legacy to which, at the time the premium was paid, the nephew was contingently entitled. *Worthington v. M'Crack*, 26 L. J. 286, C.

LEGACY.—*Alienation—Restriction—Bankruptcy, on declaration of insolvency signed by the legatee.*—A legacy given "without power in any way of anticipation," and given over "in case the legatee should assign mortgage, or in any manner anticipate the same, or attempt or agree so to do, or otherwise anticipate the same," is not forfeited by an offer to make it a security, or by a subsequent bankruptcy, or by any act unless strictly within the clause of forfeiture. The bankruptcy was founded on a declaration of insolvency signed by the legatee, and it was held that the bankruptcy must be treated as *in invitum*, and not within the conditions of forfeiture. *Graham v. Lee*, 26 Law Journ. Ch. 395; 3 Jur. N. S. 550; 3 Law Chron. 314.

MORTGAGE.—*Notice—Priority—Solicitor dealing with client* [vol. 3, pp. 255, 311].—As to the doctrines of courts of equity in dealings between solicitors and their clients, see vol. 3, p. 311. As to the neglect by a mortgagee to take the deeds from a mortgagor, *Hewitt v. Loosemore* (9 Hare, 449) is an important decision. It was there decided that a court of equity will not impute gross negligence to a man who makes inquiry for an absent deed, and receives a plausible answer to account for its absence. This does not, however, apply to a case where no inquiry at all is made. A mortgagee deposits his mortgage deed with A. to secure a debt, and afterwards deposits a

bundle of other title deeds relating to the same property with B. as security for another advance, representing that the bundle contains the mortgage deed to himself. B. having neglected to examine the deeds, and to inquire for the absent one held to be affected with notice of A.'s charge. It being proved that an equitable mortgagee was the client of the mortgagor, but without reference to the particular transaction: Held, that the burden was thrown on the mortgagee of proving that the relation of solicitor and client did not exist in that transaction. *Jones v. Williams*, 5 Week. Rep. 540.

MORTGAGE OF TOLLS.—*All mortgagees to be paid pari passu.*—*Bill by a second mortgagee against mortgagors, co-mortgagees, and others.*—*Accounts.*—Where there is an express provision in acts of Parliament to the effect that no mortgagee of a company is to have any benefit out of the tolls and rates, except that he is to be paid without any preference by reason of priority of date, there are strong reasons for holding that any mortgagee who finds that others are being paid, without having taken possession, in priority and in preference to himself (there being no covenant to pay by the company, and the only fund being that formed by the tolls, rates, and duties), might be entitled to file a bill to restrain payment of the other mortgagees in preference to himself, and to have himself and them put upon an equality; and that without being obliged to ask the court for a receiver, or putting himself in possession of the mortgaged property. Where the whole of the mortgagees, or some or one or more of them on behalf of the others of them, put themselves in possession of the property, a co-mortgagee who does not acquiesce in the proceeding (and he need not do so) may, under the acts, say, as between him and the company, and the receivers of the tolls, that he had a right to look upon the receivers as agents of the company; and that the co-mortgagees are entitled to share *pari passu*. Where, therefore, a plaintiff, a second mortgagee, subject to the above principles, filed a bill for an account on behalf of himself alone against his co-mortgagees and others as agents of the company, but failed to establish his case as to the agency, his bill was dismissed as to that, but he was held entitled to an account. *Tripp v. Bridgwater and Taunton Canal and Stolford Railway and Harbour Company*, 29 Law Tim. Rep. 176.

PUBLIC COMPANY [vol. 3, p. 322].—*Joint-Stock Companies Act, 1856, sec. 25*—*Rectification of register*—*Irregularity*—*Meeting for calls*—*Other meetings.*—The power given to the superior courts of law or equity by the 25th section of the Joint-Stock Companies Act, 1856, to order the register to be rectified, was intended to avoid the inconvenience arising from capricious or frivolous objections on the

part of the company, but the court will not entertain such an application where there is an important question to be tried as to the right of the applicant to have the register rectified. At an adjourned general meeting of the shareholders of a company, of which adjournment notice was given by circulars sent to the several shareholders, but not by advertisement, as required by the deed of settlement, a proposition for a call was carried. A shareholder, who was present and voted at the adjourned meeting, held not entitled to take advantage of the irregularity of the notice. *Semble*, if the shareholders had, in effect, notice of the meeting, the want of compliance with the provisions of the deed by advertisement would not invalidate the proceedings at the meeting. The deed of settlement provided that in every notice convening a general meeting of the shareholders, the object of the meeting should be specified. The transaction of business at the meeting foreign to the objects specified in the notice will not make the whole meeting irregular. *Re The British Sugar Refining Company*, 26 Law Journ. 369.

PUBLIC COMPANY.—*Railway company*—*Lands Clauses Consolidation Act, 1845, s. 92*—*Part of building* [vol. 1, pp. 449, 450].—Section 92 of the Lands Clauses Consolidation Act provides, "that no party shall at any time be required to sell or convey to the promoters of the undertaking a *part only* of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof." It has been held, whatever will pass with a house or building in any ordinary conveyance is "part of a house, &c.," within the meaning of the above 92nd section of the Lands Clauses Consolidation Act, 1845. Lands were purchased for the purpose of building alms-houses thereon, with a stipulation that the central portion of the design, containing the hall, library, and rooms for twelve inmates, should be erected within five years. The central portion was erected, and it was proposed to complete the design by building two side wings. A railway company served notice of their requiring to take a portion of the land upon which one of the proposed wings would stand if the design were completed, the proposed line of railway passing close to the central part already built: Held, that the central building being an integral portion in itself, the land required by the company was not part of the building within s. 92 of the Lands Clauses Act, so that the company could be compelled to take the whole land or none. *Grosvenor v. Hampstead Junction Railway Company*, 5 Week. Rep. 614.

SETTING ASIDE DEED [vol. 3, p. 184].—*Ignorance and mistake as to its purport*—*Reconveyance.*—In the following case, a deed was set aside upon the ground of ignorance and mistake as to its

purport and effect, no fraud or undue influence in obtaining its execution being allowed, and the deed itself being inconsistent with the effect contended for by the grantee under it as against the plaintiff. *Cox v. Burton*, 5 Week. Rep. 545.

SETTLEMENT.—*Power of sale—Extinguishment—Consent to sale.*—The union of a life estate under a settlement, with the reversion in fee, will extinguish a power of sale and exchange in the settlement. A power given by will to sell estates which are the subject of a settlement, which also contains a power of sale, is in abeyance, so long as the limitations and trusts of that settlement remain unperformed. A settlement was executed upon a marriage, by which large estates were settled to the use of J. A. G. for life, with remainder, to the intent that his wife, if she survived him, should receive a jointure of £600 a year; with remainder to the use of trustees for 500 years, to secure payment of the jointure; with remainder to the use of other trustees for 2,000 years, to raise portions, and subject thereto, to the use of all the children of the marriage (except an eldest or only son), with an ultimate remainder to J. A. G. in fee. Power was also given to the wife to appoint £2,000, after her decease, in aid of her personal estate, and to create a term for securing its payment. A power of sale and exchange was also given to the trustees, "during the life of J. A. G., with his consent, and, for twenty-one years after his decease, with the consent of the persons entitled to the rents." J. A. G. died without issue. By his will, he devised the estates to trustees, upon trust for sale. The trustees, under the power in the settlement, sold the estates, but the title was objected to: Held, that the power was confined by the limitations in the settlement, and that it was extinguished; that there was no person who could give any consent to the sale; and that, as the trusts of the settlement were unperformed, no present power of sale existed in any one. *Wolley v. Jenkins*, 26 Law Journ. Ch. 379.

SETTLED ESTATES ACT [vol. 3, pp. 105, 111, 196, 209, 214].—*Leases and sales of—Examination of married women.*—By section 37 of the Settled Estates Act (vol. 3, p. 110), a married woman applying to the court is to be separately examined. It has been held, in two cases, by the Master of the Rolls, that the examination of a married woman, and her consent to any application intended to be made by her under the above act, must be obtained before the petition is presented. *Semble*, the solicitor appointed to take such examination must not be the solicitor acting in the matter. *Re Brealy* and *Re Hadwen*, 5 Week. Rep. 613, 614.

SOLICITORS [vol. 3, pp. 263, 404].—*Partners—Liability of, for unauthorised use by one of the*

partners of the name of a person as plaintiff in a suit.

—It is clearly settled that to justify the use of a person's name as plaintiff in a suit in equity, a solicitor is bound to produce a written retainer, or to show by clear evidence a parol retainer unequivocally sufficient to bind the client; and that in the absence of a written authority, the oath of a solicitor without more is insufficient to prove the retainer, where it is contradicted by that of the client. The following decision shows that the court interferes summarily in such cases, and that a solicitor is answerable for his partner's act. M., a member of a firm of two solicitors, M. and H., in 1847, without any authority given by B., instituted a suit in B.'s name, as one of several co-plaintiffs, and carried it on for nine years, when B., on being served with a subpoena for payment of costs of some unsuccessful exceptions, became for the first time aware of the unauthorised use of his name: Held, upon petition by B. in the suit, that M. was responsible for the costs of the suit from beginning to end, and that H., though not personally cognisant of his partner's misconduct, was also liable, at all events, for costs incurred up to the time when, upon the dissolution, in 1849, of the partnership between himself and M., his name ceased to appear on the records of the Court as one of the solicitors for the co-plaintiffs in the suit. *Semble*, that if B. had, during the course of the litigation, become aware of the use of his name, his subsequently omitting to interfere actively to prevent its continuance would not *per se* have been sufficient to relieve the solicitors from liability to him for the costs. *Re Manby*, 26 L. J. 313, C.

STATUTE OF FRAUDS [vol. 3, index, tit.]—*Agreement to answer the debt of another—Voluntary Agreement.*—The Statute of Frauds, the 29th Car. 2, c. 3, s. 4, enacts, "that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorised." The above provision statute does not apply to a case where the party giving the guarantee is himself liable to the demand which he is purporting to guarantee; it must be exclusive debt, default, or miscarriage of a third person to bring it within the statute. A testator appointed his son and three other persons his executors and trustees. The son disclaimed and renounced probate, and afterwards purchased a por-

tion of the testator's property. The other legatees raised a claim for losses incurred by the trustees, and the son's solicitor wrote, on his behalf, to the claimants, agreeing to pay £3,000 in satisfaction of the alleged losses: Held, that this letter was not within the Statute of Frauds, as an agreement to answer the debt, default, or miscarriage of another; and that it was not invalid for want of consideration. The claim was, therefore, allowed against the son's estate. *Orrell v. Coppock*, 26 L. J. 269, C.

TRUSTEE.—*Liability of trustee for acts of co-trustee* [vol. 1, p. 90].—*Joining in receipt for sake of conformity—Wilful default* [vol. 1, pp. 408, 451].—In *Bruce v. Stokes* (11 Ves. 324) Lord Eldon thus stated the doctrine as to the liability of a trustee for the acts of his co-trustee:—"At law, where trustees join in a receipt, *prima facie* all are to be considered as having received the money; but it is competent to a trustee, and if he means to exonerate himself from that inference, it is necessary for him to show that the money acknowledged to have been received by all was in fact received by one, and the other joined only for conformity. In the case of executors it has been said, and well said, to be otherwise." The following case carries out this decision, V. C. Wood having held that the surviving trustee of a will cannot be made liable for wilful default in respect of purchase-money which was received from the sale of part of the testator's estate by a deceased co-trustee alone and misappropriated, though he joined in the receipt for the sake of conformity. *Martindale v. Picquot*, 5 Week. Rep. 552.

WILL.—*Condition—Dispensation by subsequent acts of testator—Republication—Confirmation.*—Where a prohibition is attached to a legacy, and dispensed with by the subsequent acts of the testator, by a codicil confirming the will generally, the legacy is confirmed, and the prohibition not revived. *Violett v. Brookman*, 26 Law Journ. 309, C.

WITNESS [vol. 3, pp. 221, 258].—*Decree for administration—Affidavit of debt—Chancery Amendment Act—Cross-examination—Costs.*—A creditor's affidavit filed in support of his claim for a debt, under a decree in an administration suit, is one upon which, under the 40th section of the Statute 15 & 16 Vic. c. 86, he can be cross-examined. One of the Vice-Chancellors having made an order *ex parte* that a person ordered to attend as a witness should pay the costs, the order was discharged as irregular. *Cast v. Poyser*, 26 Law Journ. 353, C.; 3 Law Chron. 221.

EQUITY PRACTICE.

ACCOUNT.—*Books of account, evidence* [vol. 1, pp. 341, 376, 450].—*Wilful default—15 & 16 Vic. c. 86, s. 54.*—With respect to wilful default, V. C.

Wood said, in the following case, that it was not intended in *Coope v. Carter* (2 De G. M. and G. 292) to enlarge the general rule laid down by Lord Eldon, that to obtain an inquiry as to wilful default, a case for such inquiry must be alleged, and one act at least of wilful default proved, to the extent of entitling a plaintiff to an inquiry as to wilful default upon a mere general and sweeping allegation. In a suit to administer the estate of a testator who had died in Jamaica in 1825, an account was directed against the surviving executor, and the representative of the deceased executor. In taking the account, the books of account, which were proved to have been recorded in the Jamaica court, were allowed to be taken as *prima facie* evidence of the truth of the matters therein contained under 15 & 16 Vic. c. 86, s. 54, without production of vouchers. Inquiry as to wilful default refused upon a bill charging generally that assets to a certain amount had been received, and that, if they had not been received, the executors had been guilty of wilful default. *Sleight v. Lawson*, 5 Week. Rep. 589.

ADMINISTRATION.—*Accounts—Payment of charges upon real estate—Tenant for life—Remainderman—Application of capital and income to discharge debts and interest.*—Upon taking the accounts in a suit to administer real and personal estate, if a question arises between the tenant for life and the remainderman, as to the proper mode of applying the personal estate, the court will, if the justice of the case require it, for the purpose of seeing to what extent and in what form the real estate is to be exonerated by means of the personalty, investigate the application of the personal estate, and proceed, as a general rule, upon the principle of applying the capital of the personal estate to pay the principal of debts, and the income of the personal estate to pay the interest of debts. *Shore v. Shore*, 26 Law Journ. 386, C.

ELECTION [vol. 1, p. 341].—*Between proceedings at law and in equity—Specific performance—Action of trespass—Double remedy.*—In general a party is not allowed to proceed at law and in equity at the same time in respect of the same matter: a suit for specific performance and an action for breach of a contract cannot proceed concurrently. A. B. having filed a bill for specific performance of an agreement to assign to him the lease of a house, obtained an interlocutory order for delivery up to him of possession and of the assignment. The assignment, which was thus obtained, was dated as of the time when possession was first claimed by the plaintiff. A. B. had, subsequently to this order, brought an action of trespass against the defendant, alleging, in other counts of the declaration, special damages arising from breach of the agreement. Held, that B., who

had obtained the benefit of the assignment by the interlocutory order, could not avail himself of it to bring an action of trespass at the time that he was suing the defendant in equity, and that he must elect, plaintiff not being allowed to sue in equity for specific performance of an agreement for the breach of which he has brought an action at law. *Gedye v. Montrose*, 5 Week. Rep. 537.

INTERPLEADER BILL.—*Time*—*Bill for new trial*.—A bill for an interpleader must be filed promptly and before verdict at common law: a bill cannot be filed for the obtaining of a new trial, though, in very distant times, this was permitted. The plaintiff was sued at law in December on an alleged contract with B.; the particulars of demand were delivered in January following; and the action came to trial in February, when a verdict was given for B. After the trial it was discovered that the contract was really with a third party, M., and that the plaintiff was liable to an action by M. The plaintiff, in April, applied for a new trial, which was refused; and he then filed a bill of interpleader against B. and M.: Held, on motion for an injunction, that the bill was filed too late. *Larabrie v. Brown*, 5 Week. Rep. 538.

INTERPLEADER BILL [vol. 3 pp. 281, 301].—*Affidavit of no collusion* [vol. 3, p. 297].—A bill of interpleader must be accompanied by an affidavit (see vol. 3, p. 297). Leave given (*valeat quantum*) to file a bill of interpleader with an affidavit of no collusion by the plaintiff's solicitor, the plaintiff being out of the jurisdiction. *Larabrie v. Brown*, 5 Week. Rep. 538.

SETTLED ESTATES ACT [vol. 3, pp. 105, 111, 196, 209, 214, 286].—*Leases settled in chambers*.—Leases to be granted by trustees under the provisions of the Settled Estates Act, 1856, must be settled in chambers. *Re Procter's Settled Estate*, 29 Law Tim. Rep. 176; 3 Jur. N. S. 534; 5 Week. Rep. 648.

THREATENING LETTERS [vol. 3, p. 394].—*Contempt of court—Committal*.—A threatening letter, addressed and sent, pending the suit, to the defendant by the plaintiff, was held to be a contempt of court, upon which to found an order for committal. *Smith v. Lakeman*, 26 Law Jour. 305, C.

COMMON LAW.

ATTORNEY.—*Bill of costs*—6 & 7 Vic. c. 73.—*Name of court in which business done*—*Part of bill bad does not vitiate residuum, overruling vol. 3, p. 376*.—The following is a most important decision relative to the bills of costs of solicitors:—Where an attorney's bill of costs, delivered under 6 & 7 Vic. c. 73, contained items which were plainly applicable to proceedings in some one of the superior courts, but did

not state in what court or courts in particular, the business was done, the Court of Queen's Bench, confirming *Keene v. Ward* (13 Q. B. 515), and *Cook v. Gillard* (1 Ell. and Bl. 26), held, that the bill of costs was sufficient, because it gave such information to the defendant as would enable him to obtain advice as to the expediency of taxation, which is all that was intended by the Legislature: Held, also, that the omission properly to designate a particular item, is not sufficient to disentitle an attorney to recover for that part which is open to no objections: Held, also, that if a part of the bill be insufficiently stated, the attorney may recover on that part which is sufficiently stated (*Haigh v. Ousey*, 5 Week. Rep. 523). As this case is so important, we give a portion of the judgment of Lord Campbell. His Lordship said, "I allow that a bill of costs ought to give to the client reasonable information, so that he may consult his attorney as to the fairness and reasonableness of the charges; but I adhere to the rule laid down in *Keene v. Ward* (13 Q. B. 515), and in *Cook v. Gillard* (1 Ell. and Bl. 26). I think that Patteson, J., in *Keene v. Ward*, takes the reasonable, sensible, and just view of the subject, when he says that the Legislature intended the client should have sufficient materials for obtaining advice as to taxation; and in *Cook v. Gillard*, we said that a client has no ground of objection to a bill who is in possession of all the information that can reasonably be wanted for consultation on taxation. Now, applying this test to this case, I think the bill tells the defendant all that the Legislature intended that it should. By the act, attorneys and solicitors are put under such stringent regulations, that they cannot conduct their business as others do. It may be, and perhaps is, well that there should be some regulations for the protection of clients; but the attorneys would have great reason to complain of vexatious regulations tending to prevent their obtaining reasonable and just remuneration for their care and skill. I do not think the Legislature imposed upon them such a burden as it is contended for by counsel—viz., that another attorney, looking at the bill, may be able to say, without making any inquiry, whether the charges contained in it are reasonable and fair. With all respect for the authority of the Court of Exchequer, I prefer to adhere to the rule we have laid down in *Keene v. Ward* and *Cook v. Gillard*, that it is enough to show that the business was done in one of the superior courts. Formerly, indeed, that rule was not applicable, because there was a different scale of costs for the three courts, but now they are all alike. Looking at this bill, a considerable part of it is unobjectionable, and if such part stood by itself, the plaintiff would be entitled to recover. Then is the plaintiff's

right to recover for that part to be barred on account of the bill containing other items which it is said are objectionable? Such a doctrine would be most unjust. When an attorney brings in his bill for a long course of business, in which all the items are quite unobjectionable in themselves, is it to be said that because of an omission in a particular item he is to lose his action? That would be most unjust, because the information could be very easily supplied. If the Court of Exchequer alone had decided this to be the law of England, and that the defendant could make such a defence, I should have bowed to their decision; but there are conflicting authorities upon this point, and, therefore, I prefer to abide by what I think right. I find there is a case decided by Tindal, C. J., in the Common Pleas, *Waller v. Lacy* (1 M. and G. 54), in which it is held that there is no such rule, but that the attorney may recover that part of his bill which is unobjectionable; the same doctrine is laid down in *Drew v. Clifford* (R. and M. 280). The Court of Exchequer, in *Ivimey v. Marks* (16 Mees. and W. 849), and the other cases cited, have come to a different conclusion; but in this conflict of authority, I adhere to the decisions of the Common Pleas and of this court—namely, that a bad item does not vitiate the whole bill, but that the plaintiff may maintain his action for that part of the bill which is not open to objection." *Haigh v. Ousey*, 3 Jur. N. S. p. 523.

ATTORNEY.—*Negligence—Foreign bill.*—An attorney being instructed to take proceedings against the acceptor of a foreign bill of exchange, brought an action against him in the name of his client; the holder of the bill, without first ascertaining whether his client's title was complete by special indorsement, as required by the law of the foreign country, and it being afterwards ascertained that there was no such indorsement, the action was discontinued: Held, that the attorney was guilty of such negligence as disentitled him from recovering the costs of the abortive proceedings. *Long v. Orsi*, 26 Law Journ. 127, C. P.

BILLS OF SALE [vol. 3, pp. 45, 87, 259].—*Registration Act—Instrument purporting to be a demise by the transferee of goods, a bill of sale within the act.*—The following decision shows that the courts will not defeat the intention of the Bills of Sale Registration Act by allowing any colourable exception. An instrument reciting a sale of certain chattels by A. to B., of which sale, however, there was no other evidence, purported to be a demise of the chattels by B. to A. at a certain rent payable quarterly, with a proviso entitling B. to enter and take possession if the rent should be unpaid for ten days after any of the quarterly days of payment, or if execution should issue against the goods of A.: Held, that the

instrument was a bill of sale requiring registration under 17 & 18 Vic. c. 36. *Phillips v. Gibbons*, 5 Week. Rep. 527.

BUILDING SOCIETY [vol. 3, p. 395].—*Construction of rules—Reasonable rule—Forfeiture of share by non-payment of subscription—Waiver of forfeiture.*—By the 33rd rule of a building society it was provided, that every member should pay 10s. per share subscription at every monthly meeting; and any member, not having executed a mortgage to the society, continuing to neglect payment of his monthly subscriptions for six consecutive monthly nights should thereupon cease to be a member of the society, and forfeit all his interest therein. By other rules, the entire management of the society was vested in twelve directors, five to be a *quorum*. The plaintiff, a member (not having executed a mortgage), for seven consecutive months made default in payment of his monthly subscriptions, but on a subsequent monthly meeting night paid them to two of the directors, who attended for the purpose of receiving subscriptions, and they accepted the arrears, in ignorance of the stringency of the rule, and gave receipts for them. At the first monthly meeting after that, the directors resolved that the plaintiff had on the sixth default ceased to be a member of the society, and had forfeited all his interest therein; and they erased his name from the list of members, and returned him the arrears paid by him to the two directors: Held, that, under the 33rd rule, the plaintiff had forfeited his interest in the society, and that the acceptance of the arrears by the two directors did not waive the forfeiture; and that the rule was not unreasonable. *Card v. Carr*, 26 Law Journ. 113, C. P.

CARRIERS.—*Railway company, special contract—Party induced to sign in ignorance of terms.*—If a person delivering goods to a railway company to be carried, is told by a clerk of the company that a paper is a mere form, and, being unable to read it, is so induced to sign a special contract for the carriage of the goods, he is not bound by it. *Simons v. Great Western Railway Company*, 29 Law Tim. Rep. 182.

CARRIER [vol. 3, p. 387].—*Loss by leakage from casks—Negligence.*—A carrier, who, by the terms of his contract, stipulates that he will not be liable for "leakage or breakage" is, nevertheless, liable if such leakage or breakage is occasioned by his own negligence. *Phillips v. Clark*, 29 Law Tim. Rep. 181.

CONTRACT.—*Goods to be delivered ex first Parcel that arrives—Delivery at two different times.*—Where a party contracts for goods to be delivered at one time, he is not bound to accept part thereof at one time and part at another; but he must make his objection at the time of the first delivery. The

plaintiffs contracted to sell to the defendant 200 tons of brimstone, "to be delivered ex the first parcel of brimstone we have in the Tyne on our account." On the 24th of June, a ship arrived in the Tyne with a large cargo of brimstone. The plaintiffs, having obtained leave from the owner to dispose of fifty tons on their own account, tendered the fifty tons to the defendant, who wished to cancel the contract, and refused to receive them. Another vessel having subsequently arrived in the Tyne with brimstone, the plaintiffs, having in like manner obtained permission of the owner to dispose of it on their own account, on the 11th of July tendered 150 tons to the defendant in fulfilment of the contract. This portion also the defendant declined to accept. The defendant never objected to the brimstone being offered to him in two deliveries: Held, that the plaintiffs had sufficiently tendered the brimstone pursuant to their contract to entitle them to recover in an action against the defendant for refusing to accept it. *Leidemann v. Gray*, 26 Law Journ. 162, Ex.

CORPORATION.—*Negligence* [vol. 3, p. 399]—*Municipal corporation, liability of, for negligence of servant—Public duty, act done in performance of.*—We have before (vol. 3, p. 399) said, that where the law requires a man to perform a public trust, and casts a public duty upon him, clothing him with authority to carry it out, and he acts *bonâ fide* and gratuitously, he shall not be liable for the act of a person whom he necessarily employs; but this does not apply to the case of a corporation not acting gratuitously. The municipal corporation of M. were empowered by Act of Parliament to do all the necessary acts for lighting the borough, and to supply the inhabitants with gas at such rates as should be agreed between them and the persons supplied; and they were directed to apply the moneys received for the gasworks in paying off the mortgages and annuities secured thereon, and in payment of certain expenses connected with their gasworks; and as to the residue of such moneys in and towards the improvement of the township of M.; and they were authorised for a period of ten years to apply such portion of the residue as they may think fit, not exceeding one moiety thereof, towards payment of the annual expenses to be incurred in supplying the inhabitants of the borough with water, and in reduction of the water-rate. While servants of the corporation were fixing a gas-pipe in a public street in M., by their negligence a piece of metal was projected with violence, and struck a passenger, and put out his eye: Held, that an action was maintainable against the corporation for the damages so occasioned, upon the ground that the case did not come within the authority of the cases applicable to

trustees for the public, performing public duties purely gratuitously. *Scott v. Mayor, &c., of Manchester*, 5 Week. Rep. 598.

FEROCIOUS ANIMAL [vol. 2, p. 229].—*Damage by—Liability of owner of dog—Scienter.*—An act of ferocity by a dog, if known to his master, renders him liable for any future acts of ferocity, though of a different nature; so where in an action against M. for the value of sheep destroyed by M.'s dog, there was evidence that four years ago he had attacked and bitten a child, and that it was known to M.: Held, that M. was liable for the damage caused by the destruction of the sheep. *Gettring v. Morgan*, 5 Week. Rep. 536.

INSOLVENT DEBTOR.—*New security for debt from which discharged—Redemption of mortgage—Bond—Statute 1 & 2 Vic. c. 110, s. 91.*—The 1 & 2 Vic. c. 110, s. 91, enacts, that "after any person shall have become entitled to the benefit of this act by any such adjudication as aforesaid, no writ of *feri facias* or *elegit* shall issue on any judgment obtained against such prisoner for any debt or sum of money with respect to which such person shall have so become entitled, nor in any action upon any new contract or security for payment thereof, except upon the judgment entered up against such prisoner according to this act." The following decision on this provision is very important—the question depending on this: Is the transaction between the debtor and creditor, the giving of a new security, or is it in truth a purchase? C. was discharged under the Insolvent Debtor's Act, 1 & 2 Vic. c. 110, from a debt secured by mortgage, and in respect of which judgment had been obtained, which had been registered. Subsequently to his discharge, the mortgage was assigned by the mortgagee, B., to A. C. was a builder, and the judgment standing against him was a hindrance to his business. It was agreed between A., and B., and C., that the mortgage should be given up, satisfaction of the judgment entered on the roll, and that C. should give his bond, in which another should join as surety, to secure the residue of the money, which was then secured by the mortgage; and in pursuance of that arrangement, C. gave his bond to A., and A. sued upon it. C. contended that it was a new contract or security for payment of the debt from which he had been discharged, and was made void by the 1 & 2 Vic. c. 110, s. 91; but the jury found that the intention was, that C. should purchase the plaintiff's interest in the mortgaged premises, and get rid of the judgment:—Held, that the transaction was not the giving of a new security for the old debt, and that A. was entitled to recover on the bond. *Ambrose v. Cook*, 5 Week. Rep. 533.

LEGACY DUTY [vol. 3, pp. 96, 122].—*English*

property—Scotch railway shares.—A testator possessed of English and Scotch personalty, his executor proved in England for the entirety, and had not presented any inventory in the Scotch courts, or paid the duty there on the Scotch personalty: Held, that the executor was liable. *The Attorney-General v. Higgins*, 29 Law Tim. Rep. 184.

MISJOINDER OF DEFENDANT [vol. 1, pp. 67, 128, 418].—*Common Law Procedure Act, 1852, s. 37—Amendment after verdict—Striking out one defendant's name after verdict for him.*—Where, in contract, too many defendants are joined, so that there is a verdict for one of them, the plaintiff cannot recover against the others (vol. 1, p. 66). Indeed, the Common Law Procedure Act, 1854, s. 137 (vol. 1, p. 67), gives the judge power to amend by striking out the name of a defendant; it has, however, been decided, that this applies to a case where a defendant is erroneously joined by a mistake, and not to a case where he is joined in order to try the question whether he is liable or not. Therefore, where the jury found for the plaintiff as against one of two defendants, and for the defendant as against the other, upon an application to strike out the name of the defendant, who was not liable, it was held, that this was not a case within the above section, and that, even if it was, it was not a proper case for its application. *Wilkins v. Alexander and Steele*, 5 Week. Rep. 610.

PATENT [vol. 3, pp. 159, 183, 396].—*Patent for combination, infringement of—Evidence of former specification—Construction of specification—Order for particulars of specification, &c., not complied with* [vol. 1, p. 16].—A patent for an improved combination is not a claim that each part of the invention is new. A patent for an improvement in a patented invention, if confined to an improvement, is not an infringement of the former patent. A patent for combination may be infringed without using the particular combination patented; and a taking and using one of the subordinate parts which was new and material in the patent process, may be an infringement, although the other subordinate parts, whether new or not, were not taken nor used. In construing a specification of a patent for a combination improving upon a well-known process, a person applying the invention must be taken to know former specifications referred to in the specifications of the patent in question. A notice by the defendant to plaintiff to admit all plaintiff's specification between 1840 and 1850, is not a compliance with a judge's order, ordering the defendant to give names and dates of plaintiff's specifications intended to be used on the trial, or that they should be excluded. Therefore, evidence of a specification in 1849 was held properly excluded; nor can it be read to show its possible

bearing upon the construction of one of the specifications in issue on the trial. *Lister v. Leather*, 5 Week. Rep. 603.

COMMON LAW PRACTICE.

ARBITRATION.—*Administering oath—3 & 4 Will. 4, c. 42, s. 41—Order of reference.*—Power to examine witnesses on oath is given to arbitrators by the 3 & 4 Will. 4, c. 42, s. 41, but it is only on the conditions mentioned in the statute, and it has been decided that unless the order of reference at *Nisi Prius* expressly gives an arbitrator power to swear the witnesses, the statute does not enable him to administer an oath. *Simmonds v. Moss*, 5 Week. Rep. 559.

ARBITRATION.—*Compulsory* [vol. 3, pp. 22, 225, 386]—17 & 18 Vic. c. 125, s. 3—*Accounts—Amendment of particulars after reference.*—There is a difference with respect to the interference of the court, between a reference by consent, and one which is compulsory under the 17 & 18 Vic. c. 125: in the former case, the parties having consented to one thing, cannot be made to consent to another. The court has power, after the reference of a cause involving mere matters of account to a master, under the 17 & 18 Vic. c. 125, s. 3, to amend the particulars of demand, and also the order of reference. *Gibbs v. Knight*, 5 Week. Rep. 562.

ARBITRATION.—*Award—Ejectment—Mesne profits—Reference of "matters in difference"—Lands taken by railway company.*—The following decision as to what is included in a reference to arbitration where lands are to be taken by a company may be useful to the practitioner, as a guide in any similar case:—Lands were taken by a railway company for the purposes of their railway, and a sum was paid by them into the Bank of England in respect thereof. The owner of the land brought ejectment against the company, and by consent the action, and all matters in difference between the parties, were referred to arbitration; and by the reference, the arbitrator was to decide "what sum should be paid by the defendants to the plaintiff as the price of, or compensation for, the land of the plaintiff which the defendants had taken for the purposes of their railway, the plaintiff thereby consenting and agreeing to make and execute such a conveyance to the defendants, and by such parties as the arbitrator might direct." The arbitrator made his award, directing that a verdict entered for the plaintiff in the ejectment should stand, and "that the sum of £719 4s. should be paid by the defendants to the plaintiff, as the price and compensation for the land of the plaintiff which the company had, at the time of making the order of reference, taken for the purposes of their railway." Held, that the reference and the award included all

that should be paid for the taking of the land by the company, and, therefore, that an action for the *mesne* profits could not be brought against the company. *Smalley v. The Blackburn Railway Company*, 5 Week. Rep. 521.

EQUITABLE DEFENCES [vol. 3, pp. 301, 324, 345].—*Allowance of, with legal defences—Practice—Terms—Claim for damages—Cross action.*—Although, where a defendant pleads an equitable plea alone, he may possibly have a right to plead it without the leave of the court, yet, where he applies for leave to plead it with other and legal pleas to the same matter, this is an application to the discretion of the court or judge, and that discretion will be exercised with regard not only to the matter of the equitable plea itself, but to all the circumstances under which the application is made. And although the plea itself is one which the court might be disposed to allow to be pleaded, yet (especially where the application is by way of appeal from the decision of a judge at chambers), if there are circumstances showing that it is pleaded for delay (as if there is an absence of any affidavit as to its truth, and of any authority to show that it discloses grounds for an unconditional injunction in equity, and the defendant is under terms to try at the next sittings or assizes), and a court of equity would probably only grant an interim injunction on the condition of the money being brought into court, and the defendant declines this condition, the court will refuse leave to plead the alleged equitable defence. Under such circumstances, leave was refused, on an action for money lent, to plead, by way of equitable defence, that the money was advanced on the security of consignments of goods to be sold by the plaintiffs, and out of which they might have reimbursed themselves, had they not wrongfully and improperly sold the same for less than the best market prices. *Atterbury v. Jarvie*, 26 Law Journ. 178, Ex.

NEW TRIAL.—*Statements by jury on trial—Not satisfactory.*—Upon a question whether it had been fraudulently agreed between the plaintiff and the defendant that the plaintiff was to conceal a certain matter from a third person, the jury found a verdict for the plaintiff, and one of them at the time said that it was a thing that was done every day. There was no evidence of such agreement having been expressly come to, and it was contended that it was tacitly understood: Held, that it was a question for the jury, and, as they had determined it, the verdict ought not to be set aside because an expression had been made use of which was not satisfactory. *Rankin v. Payne*, 29 Law Tim. Rep. 182.

PLEA.—*Leave and licence—Contract—Trespass.*—The defence of leave and licence is used where the action is for a trespass, but it is quite inapplicable in

the case of an action for a breach of a contract, the term "exoneration" being the appropriate and analogous expression. *Dobson v. Espie*, 5 Week. Rep. 560.

PLEADING.—*Replication on equitable grounds—*[vol. 3, pp. 129, 264].—*What equitable replication allowed—Demurrable matter.*—A replication on equitable grounds, setting up matters which, if they had been alleged in the declaration, would have rendered the declaration demurrable, is bad. *Reis v. Scottish Equitable Life Assurance Society*, 5 Week. Rep. 592.

STAYING PROCEEDINGS.—*Concurrent suits at law and equity—Common Law Procedure Act, 1852, 15 & 16 Vic. c. 76, s. 226.*—By the Common Law Procedure Act, 1852, s. 226, a court of law is empowered to stay an action when it is restrained by the Court of Equity. But it has been decided that a court of law will not stay an action, on the ground that there is a suit in equity pending, in which the same demand comes in question (even although the demand is for a debt, as to which and other demands the plaintiff at law has, in the suit in equity, consented to a decree for an account), where the Court of Equity has not stayed the action by injunction; the court at common law having no jurisdiction to stay proceedings on such a ground, and the provision in the Common Law Procedure Act, 1852 (15 & 16 Vic. c. 76, s. 226), only applying where the Court of Equity has stayed the action by injunction. *Pearse v. Robins*, 26 Law Journ. Ex. 183.

BANKRUPTCY.

DEED OF ARRANGEMENT [vol. 2, pp. 130, 213, 279, 410].—*Bankrupt Consolidation Act—Requisites of deed of arrangement, all creditors to share, notices of suspension, payment, and deed.*—The following is an important decision as to the validity of a deed of arrangement. To an action on a bill of exchange, the defendant pleaded that on the 1st of February, 1856, he suspended payment; that a deed of arrangement was subsequently signed by six-sevenths in number and value of his creditors, whereby it was agreed that the estate of the defendant should be administered, and the assets payable and distributable amongst the creditors, in the same manner as they would be payable and distributable if the defendant had been adjudicated bankrupt on the 12th February, 1856, and as if the debts of the parties or party thereto had been proved on the said 12th of February; that the said deed contained a covenant on the parts of the creditors, parties thereto, not to proceed against the defendant at law or in equity, to recover the amount of their debts; and that plaintiff was requested to sign, and that three calendar months' notice had been given by

defendant to plaintiff of his suspension, and of the deed. The plaintiff demurred to this plea, and relying on the cases of *Fisher v. Bell* (12 C. B. 363), *Titley v. Taylor* (1 Ell. and Bl. 521, 539), *Sarpent v. Bibby* (5 H. of L. Cas. 587), *March v. Warwick* (1 Hurl. and Nor. 158), *Gibbons v. Givalor* (8 C. B. 488), contended, first, that it was not stated that the defendant had resided or carried on business for six calendar months next immediately preceding his suspension of payment within the district of any court of bankruptcy, and to bring the case within the act, he should have resided or carried on business within the district of one and the same court of bankruptcy since, otherwise no court would have jurisdiction over the arrangement; secondly, the deed did not provide for the distribution of the defendant's estate in bankruptcy, since it only provided for distribution amongst creditors, parties to the deed; thirdly, it only provided for distribution among those who were creditors on the 12th of February, 1856, and the deed might not have been made till after then; fourthly, it excluded from distribution creditors who sued the defendant; fifthly, it did not appear that the plaintiffs were requested to sign, or had notice of the deed after it had been signed by the six-sevenths of the creditors, as required by the act, and until then, it was not a deed which they were bound to acquiesce in; sixthly, it did not appear that the plaintiffs had notice that the deed had been signed by six-sevenths of the creditors: the Court of Exchequer, however, held, that the above deed entitled all the creditors to share in the distribution of the defendant's estate, and that the covenant only bound those signing the deed, and that there was sufficient averment of the three months' notice of suspension of payment, and of the deed of arrangement. *McNaught v. Russell*, 28 Law Tim Rep. 308.

EQUITABLE MORTGAGE.—*Policy of Assurance*—*Right of equitable mortgagee to be repaid premiums*—*Official assignee ordered to join in a surrender to the office.*—An equitable mortgagee of a policy of assurance is entitled to be repaid the moneys expended by him in keeping up the policy, as well as the amount of his advances. Where the mortgagor of a policy of assurance, and his assignees had lain by for several years, and permitted the equitable mortgagee to pay all the premiums as they fell due, to an amount exceeding the present value of the policy, they will be considered as having abandoned all claim to the policy, and the creditor's assignee being dead, the official assignee will be directed to join with the equitable mortgagee in making a good title to the office on a surrender of the policy. *Re Hutch*, 29 Law Tim. Rep. 186.

EQUITABLE MORTGAGE [vol. 3, pp. 197, 198,

258, 381].—*Bills of Sale Act—Registration under* [vol. 3, pp. 45, 87, 259].—*Fixtures* [vol. 3, p. 87].—*Order and disposition clause* [vol. 3, pp. 333, 334, 381, 392].—Deposit of title deed accompanied by a memorandum in these terms:—"As a collateral security, I hereby make over to you all the interest I have acquired in my sugar refinery, at, &c., and in the machinery and effects therein, for which purpose I place in your hands all the documents relating thereto;" with full power to the mortgagee at any time without notice to sell, and satisfy his claim, and all expenses, &c. This memorandum was not registered under the 17 & 18 Vic. c. 36. The mortgagor subsequently filed a declaration of insolvency, and the mortgagee put a man in possession of the machinery, but the mortgagor continued in possession of the premises up to the time of his bankruptcy: Held that the premises must be considered to have been in the actual occupation of the bankrupt, and that, therefore, the memorandum not having been filed under the Act, the movable machinery and effects were in the apparent possession of the bankrupt at the time of the bankruptcy. *Re Pollack*, 29 Law Tim. Rep. 185.

MUTUAL DEBTS AND CREDITS.—*Set off.*—Where mutual debts and credits exist between the bankrupt and a creditor, and no specific appropriation of sums advanced by the bankrupt to the creditor, although at the time of the advances being made the latter was actually indebted to, and was also under large liabilities upon accommodation bills accepted by him for the bankrupt, but which were not then due, the creditor may not set off the advances made to him against his debt, and prove for the difference. *Ex parte Griffiths*, 29 Law Tim. Rep. 186.

OFFICIAL ASSIGNEE.—*Scale of charges by.*—If by the terms of a contract entered into by the bankrupt, the amount to be paid by instalments, none of which were payable at the time of the bankruptcy, the official assignee may treat each instalment as a separate debt, and charge commission accordingly; but where the debt at the time of the bankruptcy was due in its entirety as one debt, and the official assignee receives the amount by instalments, he will be entitled to his per centage as upon one debt only. *Re Mare*, 22 Law Tim. Rep. 185.

ORDER AND DISPOSITION.—*Reversionary interest in personality.*—*Insolvency followed by bankruptcy.*—In *Ex parte Newton* (4 Deac. and Chit. 138), the bankrupt took an assignment of a reversionary interest under a will, and deposited it with bankers, no notice having been given to the executors, and it was held not to be property within the order and disposition of the bankrupt. At the same time some observations were made in that case as to whether a

reversionary interest to which he was entitled could ever be held to be within the clause of order and disposition. Policies of assurance had been held to be so, but there was no instance of a reversionary interest having been so held. It was no doubt true that the persons entitled might deal with a reversionary interest by assignment, so that it would pass to a purchaser for value; but no authority for the proposition being to be found, *V. C. Wood*, in the following case, stated that he was not disposed to make the first decision, bringing such property within the order and disposition clause of the Bankrupt Act. *A. B.*, who was entitled under his father's will to a reversionary interest in personalty expectant upon the life of his mother, took the benefit of the Insolvent Debtors' Act in 1842. In 1854 he became bankrupt, and in 1856 the reversionary interest fell into possession: Held, as between the assignees in insolvency and bankruptcy, that the reversionary interest was not within the order and disposition of *A. B.* at the time of his bankruptcy, so as to pass to his assignees thereunder, and that the assignee in insolvency was entitled. *Reg. v. Rawbone*, 5 Week. Rep. p. 436.

PROTECTION.—*Infant—Trader debtor's petition—Debts contracted by an infant.*—The debts and liabilities incurred by an infant during infancy must be set forth in schedules under the Protection Acts. *Re Brooke*, 29 Law Tim. Rep. 83.

REHEARING.—*Lapse of twenty-one days—Bankruptcy Consolidation Act, s. 12.*—The commissioner is not precluded from rehearing an application, although the twenty-one days limited by the 12th section of the Bankrupt Law Consolidation Act, have expired, if fresh evidence has been discovered. *Ex parte Imbert*, 5 Week. Rep. 542.

SCHEDULE.—*Statement of interests in property.*—The court requires, in an insolvent's schedule, a distinct statement of property and interests in property, and if parted with, how it has been parted with. *Re Portman*, 29 Law Tim. Rep. 83.

SUBSEQUENT PROPERTY.—*Proceeds coming into court—Equitable jurisdiction of the court to allow costs, &c., of adverse claimants.*—The Insolvent Debtors' Court, under special circumstances, and by consent of all parties interested, will exercise an equitable jurisdiction in reference to adverse claims upon property passing to an assignee. A policy of insurance passed to the assignee, but not having been disclosed in the schedule, having been subsequently deposited: Held, that the court may award to the depositor out of the proceeds of the policy such sum as the equity of the case demanded. *Re Lang*, 28 Law Tim. Rep. 312.

TRADER-DEBTOR SUMMONS.—*Discharging summons on non appearance of Debtor.*—*Semble*, the

Court of Bankruptcy has no power upon the application of a creditor who has served his debtor with a summons under sec. 78 of the Bankrupt Act, 1849, and in the absence of the debtor, who does not appear to the summons, to order the summons to be discharged. The usual course in such a case is to indorse upon the summons a memorandum that the debtor does not appear. *Re*—28 Law Tim. Rep. 311.

COUNTY COURTS.

APPEAL [vol. 1, pp. 134, 315, 351, 458; vol. 2, p. 36].—*Notice of appeal, statement of grounds in jurisdiction—Rule 14, 13 & 14 Vic. c. 61, s. 14—Constructive service—Second notice—Leaving notice outside attorney's office.*—Rule 14 of the Rules and Orders for County Court Practice, 8th December, 1856, provides that "The notice of appeal shall be in writing, and shall state the grounds on which the party appeals, and shall be signed by the appellant, his attorney or agent, and such notice shall be sent to the registrar, as well as to the successful party, by post or otherwise." It has been decided that, in county court appeals, the statement of the grounds in the notice of appeal mentioned in the above rule is not a condition precedent to the jurisdiction of the superior court to hear the appeal, but a requirement for the information of the court below. The plaintiff in an action against two defendants, served a notice of appeal on all the parties; but it did not state the grounds. He then, within ten days, mentioned in the County Court Act, served a second notice, stating the grounds, on the registrar, and on one of the defendants, and on the tenth day posted to the other defendants the same notice, which, according to the course of the post, ought to have been delivered the same evening, but it was not received till the eleventh day. The plaintiff also, within the ten days, attempted to serve the notice on the defendant's attorney, but the office was shut up (as it was to be presumed from the affidavits) for the purpose of preventing such service. The parties afterwards went before the county court judge, who properly signed the case for appeal; but the respondent then protested that the notice of appeal was insufficient: Held, upon the facts above, that the superior court had jurisdiction to hear the appeal; and that there was no sufficient irregularity in the notice of appeal to take away such jurisdiction. *Semble*, also, that if the second notice of appeal which the plaintiff endeavoured to serve on the respondent's attorney had, under the circumstances, been left outside his office, such service would have been valid. *Evans v. Matthews*, 5 Week. Rep. 404.

COSTS.—*Application to deprive plaintiff of costs—Carrying on business in district—Temporary workshops*

to fulfil a contract.—Upon an application to deprive the plaintiff of costs, it appeared that the defendant was a builder, who had been employed to fit up certain houses in the county court district, where a material part of the cause of action arose, and that for the purpose of performing the contract he had set-up workshops and counting-houses there: Held, nevertheless, that as the works there were only set up for the purpose of the particular job, and his permanent business was elsewhere, he did not carry on his business there within the meaning of the County Court Act. *Gorslett v. Harris*, 29 Law Tim. Rep. 75.

FRIENDLY SOCIETIES' ACT.—*Jurisdiction of county court ousted where reference clauses.*—Where the rules of a friendly society provide for reference of disputes to a committee of the society, the county court has no jurisdiction. *Turner v. Scott*, 28 Law Tim. Rep. 373.

CRIMINAL LAW.

APPEAL [vol. 2, p. 57].—*Order to enter continuances—Appeal against rate—Respite of—Fresh grounds of appeal.*—Where the Court of Queen's Bench has ordered a Court of Quarter Sessions to enter continuances and hear an appeal against a rate, the appellant must proceed upon the original notice and grounds of appeal which the Court of Queen's Bench has ordered the sessions to enter and hear. *Reg. v. Eyre*, 5 Week. Rep. 533.

APPEAL [vol. 2, p. 57].—*Poor-rate* [vol. 8, p. 382].—*Costs—Notice of appeal against rate of reasonableness of—Entering and respiting of appeal.*—By the 17 Geo. 2, c. 4, notice of appeal against a poor-rate is to be given, and the appeal to be entered at the next practicable sessions; but if it appear to the justices that reasonable notice of appeal has not been given, they are to adjourn the appeal to the next quarter sessions, and then and there finally hear and determine the same. The Court of Quarter Sessions have no power to enter and respite an appeal against a poor-rate when such notice is a good and reasonable notice, and has been given in proper time; therefore, where upon an appeal against a rate where reasonable notice of appeal has been given in due time: Held, that the sessions were right in refusing to enter and respite the appeal, and in ordering the appellant to pay costs to the respondents: Held, also, the notice of appeal was a valid notice, although it contained a notice that the appellant did not intend to try at the next sessions, but would apply for a respite, the respondents having given notice that they should oppose such application. *Reg. v. Eyre*, 5 Week. Rep. 532.

BASTARDY [vol. 3, p. 96].—*Affiliation order—Residence of applicant for affiliation summons—Juris-*

diction of magistrates—Perjury.—Under the 7 & 8 Vic. c. 101, s. 2, and the 8 & 9 Vic. c. 10, s. 10, it is not competent for the mother of a bastard child, fraudulently, or for an improper purpose, to go out of the jurisdiction of the district in which she resides in order to affiliate her child. On an indictment for perjury on an affiliation summons, it appeared that the woman returned from service to her parents to be confined, and then went to lodge at D. for the purpose of affiliating her child. The petty sessional division to which she applied did not include the residence of her parents, but included D., and she went there for her own convenience, and without any improper reason. After the order, she went into service without returning to her parents, and she stated that she meant to leave D. immediately after the order, and she did leave the next day. She lodged at D. three weeks before she applied for the summons. The jury found that she had no other home than D., and that she resided there, if in law she could be considered to do so: Held, that her residence was at D., and that the magistrates of the petty sessional division to which she applied had jurisdiction. *Reg. v. Hughes*, 5 Week. Rep. 526.

BURIAL BOARDS [vol. 2, pp. 127—129].—*General Burial Act, 18 & 19 Vic. c. 138—Select vestry under local act not a vestry within the meaning 15 & 16 Vic. c. 85; 16 & 17 Vic. c. 134; and 18 & 19 Vic. c. 128.*—A select vestry established under a local act, which enacts "that it is to be deemed a board of guardians for the relief and management of the poor, and to be subject to the rules, &c., of the poor-law board, and to exercise and perform the duties of guardians," is not a select vestry within the meaning of the 15 & 16 Vic. c. 85, s. 52, having the right to appoint a burial board. *Reg. v. Gladstone*, 5 Week. Rep. 530.

BURIAL.—*Misdemeanor—Removal of corpse from a burial ground belonging to a congregation of dissenters.*—It is a misdemeanor at common law to remove, without lawful authority, a corpse from a grave in a burying ground belonging to a congregation of Protestant Dissenters, although the motive of the person so acting may be pious and laudable. *Reg. v. Sharpe*, 28 Law Tim. Rep. 295.

COLLECTORS OF POOR RATES.—*Vestry—Removal of poor-rate collector—Majority of vestrymen present must vote—Effect of insufficient removal of officer.*—The 18 Geo. 3, c. 74, s. 14, enacts that the churchwardens, overseers, and vestrymen of Christ-church, or the major part of them, may from time to time appoint and remove collectors of the poor-rates, and appoint others in the room of the collectors removed: Held, that a majority of the vestrymen present at a meeting for the dismissal of a collector must concur in voting for the dismissal, and that a

majority of those voting, if not a majority of those present, was not sufficient: Held, also, that a collector who had been removed from his office by a majority of votes only, such majority not being a majority of the vestrymen present (some declining to vote), was still legally the collector, and entitled to collect the rates, and to have the rate books for that purpose. *Reg. v. The Overseers of Christchurch, Middlesex*, 28 Law Tim. Rep. 855.

COSTS OF CROWN [vol. 2, pp. 58, 121, 227].—*Privilege of the Crown as to costs—Effect of 18 & 19 Vic. c. 90—Excise information—Stage carriages—Appeal to quarter sessions against acquittal.*—Secs. 1 and 2 of the 18 & 19 Vic. c. 90, do not apply to informations laid by excise officers before magistrates, or to proceedings at quarter sessions upon appeal from their decision. Where, therefore, an excise officer had laid an information under the 2 & 3 Will. 4, c. 120, s. 27, against the driver of a stage carriage for plying without a licence, and the defendant being acquitted, the excise officer appealed to the quarter sessions, where the acquittal was confirmed: Held, that that court had no jurisdiction to order that the costs of the appellant should be paid by the excise officer. *Reg. v. Beadle*, 29 Law Tim. Rep. 76.

CORONER.—*Allowance by justices of fees.*—The justices are the proper persons to decide whether an inquest has been duly held. Under the 25 Geo. 2, c. 29, the justices at quarter sessions have a discretion to disallow the coroner his fee of 20s. for holding an inquest, if they are of opinion that such inquest was not "duly taken—i. e., unnecessarily taken. *Semble*, that under the 7 Will. 4 and 1 Vic. c. 68, s. 3, they are bound to allow the coroner his fee of 6s. 8d., if an inquest has in fact been taken. *Reg. v. Justices of Gloucestershire*, 29 Law Tim. Rep. 180; 5 Week. Rep. 655.

FALSE PRETENCES [vol. 3, pp. 21, 23, 289; vol. 2, pp. 12, 166].—*Misrepresentation of quality not indictable—7 & 8 Geo. 4, c. 29, s. 53—Puffing—Sale of goods—Contract.*—By the 7 & 8 Geo. 4, c. 29, s. 53, "if any person shall, by any false pretence, obtain from any other person any chattel, money, or valuable security with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor." The Crown Court has lately been called on to give a construction to this statute, in a case of *Reg. v. Sherwood* (5 Week. Rep. 577), and the following case. The questions turned upon this, whether a misrepresentation (of a very gross character) made, during a bargain for the purchase of a commodity, of the quality of that commodity, was a false pretence within the statute. The decision of the majority of the judges was, that it was not such a false pretence, the transaction resolving itself into a mere representation of the quality

of the article sold, the article sold being really of the species it was represented to the purchaser to be—that is, spoons with silver on them, though not of the same quality as was represented: it was a mere seller's exaggeration of the quality of the article he was endeavouring to sell. In the indictment (which was for obtaining money by false pretences) the pretences charged were, that certain spoons were of the best quality, equal to Elkington's A.; that the foundation was of the best material; and that they had as much silver on them as Elkington's A. The misrepresentations were made to a pawnbroker for the purpose of procuring advances on the spoons, which were of inferior quality, and not worth the sum advanced. He stated that he was induced by the prisoner's declaration of quality, and by nothing else, to advance the moneys obtained; and that had he known the real quality, he would not have advanced money upon the goods at all. The jury found the prisoner guilty of fraudulently representing that the goods had as much silver on them as Elkington's A., and that the foundations were of the best materials, knowing that to be untrue; and that he thereby obtained the moneys: Held, by the majority of the court, that the conviction was wrong, as the spoons were of the same species they were represented to be, and the alleged false pretences amounted only to a misrepresentation of the quality of a commodity during the course of a bargain: Held (per Cresswell, J.), that the conviction was wrong; but that the law upon the subject of false pretences is in a state calculated to cause embarrassment: Held (per Willes, J., and Bramwell, B.), that the conviction was right. *Reg. v. Bryan*, 5 Week. Rep. 598.

FALSE PRETENCES [vol. 3, pp. 21, 23, 289].—*Knowledge by prosecutor at the time of parting with his money that the representation is untrue.*—If a prosecutor parts with his money upon a representation by the prisoner, which the prosecutor knows to be untrue, the prisoner cannot be convicted of a false pretence. An indictment for obtaining money by false pretences alleged that the money was obtained by the prisoner by the false pretence that he had cut sixty-three fans of chaff, when, in fact, he had only cut a smaller quantity—to wit, forty-five fans. It was proved that he was employed to cut chaff at 2d. per fan, and that he demanded 10s. 6d. from the prosecutor, stating that he had cut sixty-three fans; that the prosecutor had seen him remove eighteen fans from an adjoining chaff-house, and add them to the heap which he pretended he had cut; and that, notwithstanding this knowledge, he had paid the prisoner the 10s. 6d.: Held, that a conviction could not be supported. *Reg. v. Mills*, 5 Week. Rep. 528.

HOUSEBREAKING.—*Attempting to steal in dwelling-house—Goods specified in indictment not in dwelling-house at time of breaking, &c.*—By the 14 & 15 Vic. c. 100, s. 9, it is provided that where on a trial the proof falls short of the principal offence, the accused may be convicted of an attempt. An attempt to commit a felony is distinguishable from an intention to commit it. An attempt must be to do that which if successful would amount to the felony charged. In order to prove an attempt to steal in a dwelling-house, there must be proof that some of the articles charged in the indictment were there. Upon the trial of an indictment for breaking and entering a dwelling-house, and stealing therein certain goods specified in the indictment, it appeared that at the time of breaking and entry, the goods specified were not in the house, but that there were other goods there of the prosecutor. The jury acquitted the prisoner of the felony charged, but found him guilty of breaking and entering the dwelling-house of the prosecutor and attempting to steal his goods therein: Held, that the conviction could not be supported. *Reg. v. McPherson*, 5 Week. Rep. 525.

JUDGE INTERESTED.—*Appeal—Judge owner of shares in company.*—Where the judge presiding at the trial of an appeal, was registered owner of five shares in a company, which was a party to the appeal, it was held that such judge was interested in the appeal, and that the order of sessions in such appeal must be quashed. *Reg. v. Storks*, 5 Week. Rep. 563.

LARCENY BY ADULTERER [vol. 1, p. 95].—*Carrying bundle containing wife's apparel.*—The prisoner, who lodged at the house of the prosecutor having agreed with his wife to go away and live in adultery, left the house; the wife followed, and the prisoner was overtaken on the road in her company, carrying a band-box containing her wearing apparel: Held, that a conviction for larceny of the property so found on him, the indictment stating it to be the property of the husband, must be quashed. *Reg. v. Fitch*, 5 Week. Rep. 527.

MALICIOUS TRESPASS [vol. 2, p. 316].—*Decision of magistrate not reviewed—Habeas corpus—Claims of ownership—Malicious act of trespass.*—Where a person convicted under 7 & 8 Geo. 4, c. 30, of a malicious trespass, admitted the act complained of before the justice, but said that he did it as an act of ownership, the Court of Queen's Bench will not grant a writ of *habeas corpus* upon an affidavit setting forth this fact, for otherwise the court would be reviewing the justice's decision upon the facts. *Re —*, 5 Week. Rep. 607.

MASTER AND SERVANT.—*Absenting from service* [vol. 2, p. 53]—*Apprentice—Second conviction*

—*Punishment—Power to inquire by affidavits into jurisdiction of justices*—6 Geo. 3, c. 25, s. 4—4 Geo. 4, c. 34, s. 3.—We have before noticed a decision in the following case in the Court of Queen's Bench, and we now give the decision of the Court of Exchequer, conflicting on some points, but agreeing as to others. B., a working potter, was convicted before a magistrate of having unlawfully absented himself from his service, and was sentenced to be imprisoned for one month: Held (per Pollock, C.B., Martin, B., and Bramwell, B.), that the conviction was bad for not awarding as to the abatement of B.'s wages during his imprisonment, as required by 4 Geo. 4, c. 34, s. 3, which authorises a justice of the peace in such a case "to commit every such person to the House of Correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months, and to abate a proportional part of his or her wages for and during such period as he or she shall be so confined." Per Watson, B., dissentiente, that the 6 Geo. 3, c. 25, s. 4, empowering the magistrate to sentence to imprisonment *simpliciter*, was not repealed by 4 Geo. 4, and that the conviction was good under the earlier statute. A warrant of commitment recited that complaint upon oath had been made that W. B. did agree to serve as a potter under a written agreement for a certain time, and having entered upon and worked under such agreement, and the term of his agreement being unexpired, he did unlawfully misdeemean himself in his service by absenting himself from his service, &c.; the magistrate did adjudge the said complaint to be true, it appearing to him, as well upon the examination on oath of J. S. in the presence of the said W. B. as otherwise, that the said W. B. having contracted to serve as a potter, and the term of his contract being unexpired, did, on, &c., misdeemean and misconduct himself in his said service by neglecting and absenting himself, &c.: Held, first, that the facts of the contract being made, the service entered upon, and W. B. having absented himself, were sufficiently stated. Secondly, that the warrant was not open to the objection that evidence not on oath or not in the presence of the prisoner had been received, as it must be presumed that the words "as otherwise" referred to other legal evidence. A servant or artificer, within 4 Geo. 4, c. 34, s. 3, who absents himself a second time from his service under the same contract, may be punished by virtue of that statute for such second absenting, notwithstanding he was committed to prison for the prior absenting; and a neglect and refusal to return to his work after the expiration of the period of imprisonment, if the time during which he contracted to serve has not then expired, is a fresh absenting. *Dissentiente*, Pollock, C.B., and per Pollock, C.B.,

and Martin, B., that if such servant or artificer absent himself under a claim of right to treat the contract as at an end, and with an avowed determination of never again returning to his service, and is punished by imprisonment for such absents, the contract can no longer be treated as subsisting so as to subject the workman to punishment for neglecting to return to his employment at the expiration of his sentence. The court may, on an application for a *habeas corpus*, inquire by affidavit into facts which were necessary to give the magistrate jurisdiction. *Dissentiente*, Bramwell, B.; *dubitante*, Martin, B. *Ex parte Baker*, 5 Week. Rep. 661.

QUARTER SESSIONS [vol. 2, pp. 215, 305].—*Municipal borough—Appeal against conviction—Bye-law—Certiorari taken away* [vol. 2, p. 20].—Where the certiorari is taken away, a case from the sessions may be up brought for the opinion of the Court of Queen's Bench by consent of the parties. The court will entertain a special case stated by consent, on an appeal at a municipal quarter sessions, to ascertain whether a conviction under a bye-law was right on the merits, although the certiorari to remove the case is taken away by the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 182. *Reg. v. Dickenson*, 29 Law Tim. Rep. 180; 5 Week. Rep. 654.

TOWNS IMPROVEMENT CLAUSES ACT, 1847.—*Cleansing district—Removal of dust, ashes, and rubbish — Manufactory — Birmingham Improvement Act*, 1851 (14 & 15 Vic. c. 93), 10 & 11 Vic. c. 84, s. 87.—By s. 50 of the Birmingham Improvement Act, 1851, the clauses of the Towns Improvement Act, 1847, "with respect to cleansing the streets," are incorporated therewith. By s. 87 of the Towns Improvement Act, the commissioners are required to "cause all the dust, ashes, and rubbish to be carried away from the houses and tenements of the inhabitants of the town or district within the limits of the special act, at convenient hours and times." Held, that the commissioners were not bound to remove dust, ashes, and rubbish, arising from coal, slack, and other combustible materials consumed, and used in a process of manufacture of iron tools, carried on in a building used as a factory, and in which a servant of the occupier resided with his family. *Quære*, whether an action will lie against commissioners for neglect of duty in not removing dust, ashes, and rubbish, which they are required by the 87th section of "The Towns Improvement Clauses Act, 1847," to remove. *Lyndon v. Standbridge*, 5 Week. Rep. 590.

VAGRANT ACT [vol. 3, p. 330].—*Commitment—Frequenting public place—Railway station—Platform*—5 Geo. 4, c. 83, s. 4.—*Stating offence*.—The 4th section of the Vagrant Act (5 Geo. 4, c. 83), enacts, that "every suspected person or reputed

thief frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse, near or adjoining thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony, may be committed as a rogue and vagabond." D. was convicted as a rogue and vagabond, the warrant of commitment describing his offence to be that he being a suspected person "at the railway station in the parish of D., in the said county, the same being at the time a place of public resort, did frequent the platform of the said station, with intent to commit felony." Held, a sufficient statement of an offence within the 4th section of the 5 Geo. 4, c. 83. *Ex parte Davis*, 5 Week. Rep. 522.

WINE LICENSE.—*Sale of sweet wines by retail to be consumed on the premises—Excisable liquors*.—British made wines are not excisable liquors within the meaning of the 9 Geo. 4, c. 61, s. 18, so as to require a license for selling them by retail for consumption on the premises of the retailer within that section, provided the retailer has the license required by the 4 & 5 Will. 4, c. 77, for the sale of them. *Reg. v. Lancashire*, 29 Law Tim. Rep. 181; 5 Week. Rep. 658.

DEBATING SOCIETIES.

THE BIRMINGHAM LAW STUDENTS' SOCIETY.

June 10.—*Moot Point*, No. 224.

A., describing himself as an agent, but having, in fact, no principal, enters into a contract with B.; can B. bring an action on the contract treating A. as the principal?

This point occasioned a very spirited discussion—the law of agency being well developed, the rules applicable to the subject carefully considered, and many logical deductions made; in short, without being the least egotistic, our society manifests a decided tendency towards improvement, and whatever its result may prove, we have the deep satisfaction of knowing and feeling that debating societies are of the greatest possible importance to articled clerks, and that it is the duty of such, in every town mustering two or three, to promote the study of the law by association and discussion. It is unquestionably an indispensable element of success.

The three leading cases generally cited in connection with agency cases, are to be found in Smith's Leading Cases, vol. 2—*Paterson v. Gandasequi*, *Addison v. Gandasequi*, and *Thompson v. Davenport*; and they chiefly decide in respect of the liability of an unnamed principal when discovered. This is one point: the liability of the principal, when discovered, is settled. The next view will establish the liability of the agent, where, believing himself

invested with authority to contract for a principal, it transpires that his authority has ceased, or that he has exceeded such authority. Here his liability arises to the vendor for all damage sustained by reason of the breach of contract (see *Randell v. Trimen*, 25 L. J. R., C. P., 307; *Collen v. Wright*, and others, executors, 26 L. J. R., Q. B., 147; see also *Jenkins v. Hutchinson*, 18 L. J. R., Q. B., 274; *Lewis v. Nicholson*, 21 L. J. R., Q. B., 311). These cases will illustrate the second proposition. The next proposition is contained in the moot point. Where A., describing himself as agent, without disclosing the name of any individual as principal, or specifying the name of any individual as such, but, in point of fact, in both instances, having no principal whatever, enters into a contract with B.; here we hold that A. is the real principal in the case, and can be sued on the contract in that capacity; for to contend that the fictionally created principal is to be sued, is to override all reason and authority. In support of the proposition on the moot point, see *Schmeltz v. Avery*, 16 Q. B. 556; 20 L. J. R., Q. B., 229; *Cane v. Jackson*, 7 Ex. 382; 21 L. J. R., Ex., 137; *Jones v. Downman*, 4 Q. B. 235; same case on appeal, 14 L. J. R., Q. B., 226, on special circumstances, and whether agent contracted as principal or not. Agent, describing himself as such, may so contract as to make himself principal (see *Turner v. Christian*, 24 L. J. R., Q. B., 91; *Lennard v. Robinson*, 24 J. R., Q. B., 276).

From the above propositions we may collect the following inferences:—1. That where A. contracts with B. without stating himself to be an agent, B. may, on discovering his principal, elect between them; and that the rule is the same where he states himself to be an agent, but does not name his principal. 2. Where, not having in fact authority to make the contract as agent, he yet does so, under the *bond fide* belief that such authority is vested in him, a personal responsibility arises. 3. That if he state himself to be an agent, but have really no principal, he is in law himself the principal, and may be sued as such.

The meeting decided in support of the third inference being the affirmative of the moot point.

A. FEREDAY, Corresponding Secretary.

ARTICLED CLERKS.

STAMPING ARTICLES BEFORE INROLMENT.

GENTLEMEN,—In a short editorial article under the above head, at p. 342 of your present month's publication (vol. 3, p. 342), in commenting upon the case of *Exparte Williams*, and the construction thereby placed upon the statute 19 & 20 Vic. c. 81,

you remark that the judgment of Mr. Justice Erle "has completely nullified the utility of it (the act), inasmuch as his Lordship decided that before articles can be inrolled they must be stamped—so that the statute has just effected this change, that if by any accident the officer of the court should permit articles to be inrolled without being stamped, the act might be brought into operation," &c. Now it appears to me that the case you put is not the only instance in which the healing powers of the act may be applied, and that the judgment in the above case, so far from mollifying the statute, is in precise accordance with the spirit as well as with the letter of it. For, I take it, the principal or only object of the statute is to confer a power on the Commissioners of Inland Revenue to stamp articles which had been omitted to be stamped within the time allowed by law, and that the invariable course which any gentleman desiring to avail himself of the provisions of the act would pursue, would be, in the first place (and before taking out a rule under the 6 & 7 Vic. for inrolment of the articles), to get the stamp affixed, which, I apprehend, will be allowed almost as a matter of course, for we cannot suppose that the Commissioners would demur to exert their newly-acquired power on payment of the proper penalty imposed by the act.

Perhaps, upon reconsidering the matter, you may incline to my view, in which case I shall feel obliged if, in conformity with your well-known readiness to correct occasional inadvertent errors, you will find space in your next number for this communication, as I should exceedingly regret, as I am quite sure you would, that anything in your widely-circulated and much-esteemed periodical should be at all calculated to mislead any one of your numerous readers, who may be accustomed to accept your articles with pure faith and simplicity.

I remain, &c.,

CHARLES J. FOX.

P.S. The above was received some time since, but was accidentally omitted. We now insert it, with the remark that we still remain of the opinion before expressed. It seems not to be understood that if the articles are not inrolled within six months, the service will, unless the court shall otherwise order, reckon, not from the date of the articles, but merely from the time of their inrolment. Now, if the articles be not stamped and inrolled within the six months, there will be two applications necessary, in order to endeavour to obtain the benefit of the articles from the time of their date—namely, first to the Treasury, for leave to have the articles stamped, and next to the court, to allow the service to reckon from the execution of the articles (vol. 3, pp. 111, 112). Then comes the

point, if the Treasury permit the stamping, will the courts, as a matter of course, permit the service to reckon from the execution of the articles. We adhere to the opinion that they will not; and the case of *Ex parte Williams* (second application, 5 Week. Rep. 559) supports our view. In that case, indeed, Mr. Justice Coleridge allowed the clerk's service to reckon from the time of the execution of the articles, though they had not been inrolled within six months from their date, but this was under the peculiar circumstance, that the time had elapsed whilst the court was considering the first application (vol. 3, p. 342), and not merely on the ground that the articles had been allowed to be stamped after the six months. In such cases, therefore, it would be preferable to cancel the articles, and to enter into a fresh contract for service, which might be stamped and registered within six months after execution, whilst the service would reckon from the execution.

[Since the above was written, and in type, we perceive that in the case of *Re Hand* (5 Week. Rep. 622), the Court of Queen's Bench refused, where the articles had not been stamped in due time, to allow the service of the clerk to reckon from the date of the articles, it not being shown that the clerk was ignorant of the want of the stamp; and Coleridge, J., added, that possibly the court would not assist the clerk, even though the latter was not aware of the want of the stamp. But this is going further than we have done, and seems scarcely supportable, especially if it could be shown that the stamp was omitted to be affixed through the misconduct of any party other than the clerk. Strangely enough, the case of *Ex parte Hand* (5 Week. Rep. 687) has been again before the court, and second articles, upon which the duty had been paid, were vacated, and the service under the first articles was allowed to reckon from their date; but it was shown that the attorney who ought to have stamped the articles omitted so to do without the clerk being aware thereof.]

Several questions have been raised regarding the qualification of articulated clerks to be admitted.

1st. Whether a *Master of Arts* can be admitted after three years' service, like a Bachelor of Arts, or Bachelor of Laws, under the 6 & 7 Vic. c. 73, s. 7? A judge at chambers has decided that this cannot be done.

2nd. Whether a gentleman in *Deacon's Orders* can be articulated, examined, and admitted as a solicitor? There is no statute or decision on the subject; but, as deacons cannot be called to the bar, nor become proctors, the question is to be submitted to the court.

Result of Examination.—At the last examination

in Trinity Term, 1857, out of ninety-six candidates, nine only were rejected, making eighty-seven who passed successfully through the ordeal. Of these the two following received prizes of books—viz., Mr. Edward Balden, of Birmingham, and Mr. Walter Browne, of Lenton, Notts. The following candidates passed examinations very little inferior to the above—viz., Mr. Jos. Fallows, of Piccadilly, London; Mr. W. S. Forster, of Lewisham; and Mr. W. H. Randles, of Ellesmere.

ANSWERS TO MOOT POINTS.

No. 174.—*Liability of Proprietor of Dining-house* (vol. 3, p. xlvii.).

The customer in this case lost his money from his own negligence by leaving it on the table, and not from the negligence of the proprietor of the dining-rooms in any way whatever. The proprietor of the dining-rooms is not to be accountable for the loss from the customer's own negligence—moreover, the money was never in the custody of the dining-room-keeper.

I am of opinion that the finder can insist on holding it, as against the dining-room proprietor, until the customer who lost the money be found.

Where a man finds goods that have been actually lost, or are reasonably supposed by him to be lost, and appropriates them with intent to take the entire dominion over them, at the same time *knowing or reasonably believing that the owner can be found, it is larceny*, whether the finder afterwards converts them to his own use or not (see *Richmond v. Smith*, P. B. and C. 11; *R. v. Thurborn*, 2 Car. and K. 831; *Roscoe's Law of Evidence*, p. 375, and *Archbold* (1852), p. 389. SONORIOUS.

CORRESPONDENTS ON MOOTS POINTS.

The following is to be added to the lists published in Vol. III., p. 181, xx, xxiv, xxx, xxxvi—viz., Mr. George Consu, at Messrs. Ranson, George, and Wade's, Bradford, Yorkshire.—We shall give a revised list of correspondents in next number, and shall therefore be glad to receive additional names, and any alterations required to be made.

SUBSCRIPTIONS AND ARREARS.

Vol. III. being now complete, all subscriptions must be paid up forthwith. The amount for that volume is £1 2s. Very many subscribers are much in arrear; and we really must request them to pay up without any further delay, as the non-payment is a great inconvenience to us. The amount to an individual subscriber is comparatively small; but when there are several hundreds in arrear, the amount becomes of considerable importance to us.

The subscription for the next volume (Vol. IV.) will be £1, if prepaid. Post-office Orders should be made payable at the STRAND Post-office, to our publisher, Mr. THOMAS DAY, of No. 13, Carey-street, London, W.C.

METHODS OF SELF EDUCATION.

The following is a summary of a paper read by Mr. P. A. Smith (at a recent meeting of the Juridical Society) on "Methods of Self-Education, recommended or adopted by some English lawyers in the last two centuries":—In some of the earlier volumes of the publication, of which the present is a continuation, will be found fuller statements of some of the "methods" referred to by Mr. Smith, but as many of our readers may not have those volumes, we give Mr. Smith's account, which will, we think, not only be interesting, but useful.

Legal education in the Inns of court, as it formerly existed, was to a considerable extent systematic and collegiate. But in the seventeenth century changes took place. Roger North (in a book written towards its close) speaks of the want of instruction then, and thenceforward students in the inns have been left very much to their own resources, with such varying aids as friendly suggestions or books could supply. The present system of classes, lectures, and examinations is an exception; but, in an enlarged form, it is of recent date; and private tuition has for the most part dealt more with the practice of law than the principles.

During the interval between the ancient system and the present, some of our most eminent lawyers have grown up; and an inquiry into the methods which they employed seems not an idle or fruitless one.

An early notice of one of these methods occurs in Sir Matthew Hale's preface to Rolle's Abridgment, where he tells of the author, that he was of the same society with four other eminent men, and that it was "the constant and almost daily course for many years together of these great traders in learning to bring in their several acquies therein, as it were, into a common stock by mutual communication."

Association in study scarcely deserves less attention on account of the occasional talk in the pupil-room on legal topics, which is found in the modern system of private tuition. There is likely to be too much attention to drawing to allow free scope for a well-weighed system of mutual study.

Arrangement and selection are principally the advantages of such a plan; but the tutor's papers have to be taken as they come, and are uncertain as to time and subject-matter. Is it not, therefore, of material consequence that a law student with any high aims should find companions beyond the limits of his chambers, and concert with them schemes of reading, cross-questioning, analysing, and discussing, which may be made preparatory or supplemental to the usual routine of work? If authority were needed for the advantages of such a plan, the instance of

Sir Samuel Romilly would supply it, who used, with his friend Mr. Baynes, to compare the notes which they took in court; and in a little society, consisting only of themselves and two others, they argued and acted as judges in turn—an exercise which he describes as very useful to them all.

Roger North, in the little book above referred to, gives advice as to legal education in his time; and it is curious, and in part, useful still. For reading, he recommends the text of Littleton's Tenures, without comment, and notices Perkins's Profitable Book, and the book known as "Terms of the Law." For a somewhat later stage, and as lighter subjects, a work on Ancient Tenures, Doctor and Student, and Fortescue de Laudibus Legum Angliæ. For more serious reading after Littleton, Plowden's Commentaries, and (to be taken along with these) Fitzherbert's Natura Brevium, Crompton's Jurisdiction of Courts, and Stamford's Pleas of the Crown, with the book at the end, De Prærogativa Regis, and Manwood's Forest Law. But, with the treatises, there should be at hand some illustrative precedents—the Registrum Brevium, and some of the books of entries, as Rastall, Coke, &c. He recommends the Year Book called Henry VII., and some of Sir E. Coke's Institutionary Pieces, as his Pleas of the Crown, Jurisdiction of Courts, and Comments upon Magna Charta and the old Statutes. Afterwards the student might enter upon some of what were then the more modern reports.

The diligent construction of a common-place book by the student himself, North treats as a material part of his scheme, and reasons in favour of it with considerable force. Another of his expedients is reporting, the student making his own notes in court of the material points in cases—first, in a rough note-book, and afterwards in one more carefully kept. A peculiarity in this author's views is his disesteem of Coke upon Littleton, partly as being in effect a ready-made common-place book, without, therefore, the advantages of one of the student's own making. Some advice on the study of the law of about the same period, and of much greater authority, on account of the person who gave it, is to be found in Sir M. Hale's preface (before noticed) to Rolle's Abridgment. Sir Matthew Hale enforces the importance of method, and gives an outline of a course of study. "First," he writes, "it is convenient for a student to spend two or three years in the diligent reading of Littleton, Perkins, Doctor and Student, Fitzherbert's Natura Brevium, and especially my Lord Coke's Commentaries, and possibly his reports. This will fit him for exercise, and enable him to improve himself by conversation and discourse with others, and enable him profitably to attend the courts at Westminster." Afterwards he treats of common-

placing, and, still later of the Year Books, among which he mentions as chiefly useful, the last part of Edw. 3, the Book of Assizes, the second part of Hen. 4, Edw. 4, and Hen. 7. After these he lets the student come down to Plowden, Dyer, Coke's Reports the second time, and other reports then lately printed. He advises the student to compare case with case, and the pleadings of cases with the books of entries, especially Rastall's.

Of this scheme of Sir M. Hale's, from which these suggestions are taken, Sir Thomas Reeve (Chief Justice of the Common Pleas in the reign of George II.) writes that it was the best extant. He himself gives some advice to a nephew, mentioning successive objects which the student may set specially before him.

To turn from courses recommended to courses pursued, and from the special mode of studying English law to the auxiliary studies which eminent lawyers have taken as introductory or collateral. Here two instances occur as among the most obvious and common—history, and the Roman civil law. As to the latter, we read of Sir M. Hale, that "he set himself much to the study of the Roman law, and though he liked the way of judicature in England by juries much better than that of the civil law, where so much was trusted to the judge, yet he often said that the true grounds and reasons of law were so well delivered in the digests, that a man could never understand law as a science so well as by seeking it there, and therefore lamented much that it was so little studied in England."

Distinct authorities may be cited as especially pertinent to other branches of knowledge proper for the student: Lord Somers, as an authority for the study of constitutional law; Lord Mansfield for an enlarged view of the study of general history; Chief Justice Wilmut, as an attractive example of the consistency of studious and scholarly tastes, with fitness for eminent legal position and duties; Sir Wm. Blackstone, as one who, failing at first of professional success, was afterwards greatly assisted in arriving at it by the laborious study of books—coupled, in his case, it is true, with an especial skill and taste in the use of written language.

To any one who should doubt whether a comprehensive cultivation of general literature is suitable to a lawyer, Sir Samuel Romilly may be mentioned as an eminent instance. The extent of his studies would incline a reader to doubt the account of them if coming from unknown testimony, but we have his own authority for that account.

Both Sir Samuel Romilly and Sir Wm. Jones are leading examples of attention to oratory with a view to the bar, and Sir William is also memorable as an

authority for the study of foreign law, both ancient and modern.

It is surely reasonable to expect to find instances of a widely-extended pursuit of knowledge in the members of such a profession. The studies and duties of the English bar seem to justify, if not to require, it. Real property law is connected with the history of feudalism; constitutional law, with that of the English Government, and with the principles of government in general; commercial law, with the growth of trade and manufactures; criminal law, with the discussion and application of moral rules. The business of an advocate brings him into contact with the examination of the motives and dispositions which occasion or modify human actions, and some analytical study of the mind of man in the abstract seems not useless with a view to such an employment. Again, it is almost too little to say that the laws relating to contracts, to trusts, to partnerships, to frauds, and to other classes besides, derive illustration from a comparison with the laws of Rome. There are such points of resemblance and connection, that a moderate amount of time spent on the civil law is among the most obvious of preparatory studies. And it is not these more cognate studies only that are fitted to be of real advantage to a lawyer—versatility and enlargement of mind are of use in professional duties, and so is a cultivated and ripened taste. It could scarcely be said with truth of any branch of practical science, that it could not be of valuable service to an advocate; and the advantage is real, though it may perhaps more easily escape attention, of gaining an acquaintance with all wholesome and sterling literature (in so far as such a habit does not trench on more essential studies), as tending to raise the tone of the mind generally, and to make it more influential on others, on account of a genuine superiority.

With respect to a deliberate cultivation of the power of public speaking, there seems reason to doubt the wisdom of the comparative neglect of it. Several causes minister to this. One is an idea that eloquence, as well as poetry, is allotted to some favoured persons only, and that there is something of conceit in the attempt to cultivate the power of speaking, as implying pretensions to such an exceptional talent. But it may be answered that it is well that those who would never be great orators should yet speak with correctness, and clearly; that there is some inconsistency in a man's going to the bar at all (except as chamber counsel) if he disclaims even a moderate aptitude for speaking; and that it is not desirable, either for the client's interests or the barrister's reputation, that the first dubious attempt should be made in a case where there are practical results immediately involved. Whether preparation

and practice be more or less valuable with a view to make a really powerful speaker, they seem the proper means for correcting actual faults of style, and for supplying the degree of confidence, without which good enough materials will not be well handled. And in this, as well as many other things, it is probably true that he that aims high will shoot high, though he shoot not so high as he aims.

The ancient law books recommended by the authorities before cited are now seldom seen in the hands of practical lawyers, or perhaps even of practical students. But it seems strange that this neglect has prevailed so greatly. Is it really the case that nearly all which is of much value in them for present practical use is to be met with in a serviceable form elsewhere; or is it not rather that students, disgusted with their supposed dryness, and unable at first to tell what parts of their contents are obsolete, do not fairly test their worth?

Whatever opinion be entertained upon this point, it will scarcely be doubted that there is at least some reason for the importance attributed to companionship, in study, the companionship of a few carefully-chosen associates in a hearty, assiduous prosecution of learning—if both general and legal, so much the better, but of legal studies at any rate.

Congenial men, resolutely set upon such a plan, would be likely to place their standard of attainments high, and to arouse in one another tastes for various kinds of excellence, which at first were not common to them; a friendly criticism might detect and expose weak points in their several theories or plans, while there was still time to change; and the discouragements which attend upon the lonely student would be lightened by the consciousness that others were struggling upwards amidst like difficulties and with like aims. Wearied and refreshed by turns, but seldom all together, such comrades on the long and rugged ascent which leads to excellence in our profession, might be likely to find their journey less trying and more speedy than that of the traveller who passed on from point to point alone.

The energy which sometimes accompanies loneliness, and seems almost to outweigh its disadvantages, can hardly be unattainable amidst more social studies, while these may increase its value by giving a better direction to its efforts.

And not the least pleasant attendant on such a course might be its retrospect, when in the possession, if not of success, yet, at least, of the merited friendship of companions more successful than himself, the student should retrace in memory the old path, rich to him not only with recollections of energy and patience, and of a liberal and philosophical pursuit of the profession, but also with far-extending recollections of the sympathy and esteem of

his fellow-travellers. This the lonely student, however successful, would want.

VENDORS AND PURCHASERS.

MISDESCRIPTION.—*Puffer*—*Property wholly worthless*—*Share of bankrupt partner in an insolvent firm.*—A firm had become insolvent. One of the members was separately insolvent, and *non compos*; another was separately adjudicated bankrupt. In order to procure a title to the separate interest of the *non compos* partner (whose separate creditors would not enter into an arrangement for releasing it) one of the creditors, who was also a separate creditor of the bankrupt partner, obtained an execution against the *non compos* partner, and sold by the sheriff at auction, expecting and intending to purchase himself, and sent a clerk to bid up to £150. The plaintiff purchased at £151, the property being quite worthless: Held, such a concealment of circumstances as to justify the sale being set aside, with costs. *Smith v. Harrison*, 3 Jur. N. S. p. 287.

RIGHT OF WAY.—*Sale of land surrounded by lands of strangers*—*Specific performance*—*Right of cartway.*—A vendor sold a piece of arable land, which was surrounded on all sides by the lands of strangers, but no mention was made in the contract of any right of way. The vendor was unable to show a title to a carriage way to the land in question. On a bill for specific performance by the vendor, the court refused to enforce the contract. The plaintiff relied on the three following points—first, that nothing was said about a right of way in the contract, and that a contract for sale does not in itself import a cartway; secondly, that the defendant was, at the time of the purchase, well acquainted with the nature of the holdings in the common field, and the rights of access enjoyed by the proprietors; thirdly, that the purchaser was told by the plaintiff's agent, that though his belief was that there could be no part of the common field which had no right of way, yet he would not undertake to say where the way was, and that the purchaser must be content to take the rights of the vendor. With respect to the first point, the court did not think it material that the question had been narrowed to a right of cartway. The land was arable, and a cartway was necessary for the cultivation of the land. As to the rest of the objection, the court was of opinion that (whatever might be the view which a court of law might take of the question) it was not consistent with the principles of a court of equity to enforce such a contract without a way for carts and carriages; such a course would, in fact, be, to make the purchaser pay for what he could not enjoy. As to the second point, the court thought

that no case had been made which could affect the purchaser. The evidence fell far short of satisfying the court that the purchaser or his agent had knowledge of the rights of the proprietors of the common field. The evidence on the third point was certainly contradictory; and if the issue had been confined to this point, the court said it should have found some difficulty in deciding it. On the result, however, of the evidence, the court was satisfied that representations were made by the vendor's agent to the purchaser's agent to induce him to believe that there was an undoubted right of way to the particular land in question, and that these representations were not warranted by the fact. *Denné v. Light*, 5 Week. Rep. p. 430; 29 Law Tim. Rep. 60.

SALE BY MORTGAGEE.—*Time for exercise of power not arrived—Specific performance.*—The following decision as to a sale by a mortgagee, under a power to be exercised only after a notice to the mortgagor, is one of much practical importance. In a suit for the specific performance of a contract for sale, under a power of sale, after three months' notice to the mortgagor, contained in a mortgage, which contract had been entered into before the three months' notice to the mortgagor required by the mortgage deed could by possibility have elapsed, the purchaser having refused to execute the conveyance in consequence of the non-concurrence of the mortgagor, V. C. Stuart refused to make any decision as to the necessity of such concurrence, as the time for making a valid contract had not arrived when it was entered into, and only made an order that the title should be investigated (*Ford v. Heely*, 5 Week. Rep. 516). In his judgment, the Vice-Chancellor said: "In this case the plaintiffs, who are mortgagees with a power of sale, say that they have made a valid contract with the defendants for the sale of the property. The defendants say that the plaintiffs have not shown a good title, and cannot enforce the specific performance of the contract without the consent of the mortgagor, and ask for a declaration to that effect. The power of sale is framed in a very elaborate way, but does not seem to have been very successful in accomplishing the end desired. It first gives a power to sell in default of payment of principal money and interest, and at the end contains a provision in favour of a purchaser, the object of which is to relieve him from the necessity of inquiring, or from any liability in the event of his not inquiring as to the circumstances of the sale. It seems difficult upon principle to say that a provision in favour of a purchaser can be of any effect till a valid contract is made. The mortgagees were only empowered to sell in a certain event. That event had not arisen, and, therefore, the time for making the contract had not arrived; and it is, there-

fore, immaterial to inquire whether the language referring to a purchaser can apply. The question as to the concurrence of the mortgagor does not come before the court in such a shape as to be susceptible of a valid decision. It appears that the mortgagees thought fit to take an authority from the mortgagor by a separate instrument, dispensing with the necessity of notice; and there was an agreement on his part, that he would concur in the conveyance. Considering all the circumstances of the case, it would be rash for the court to give the right to insist on the concurrence of the mortgagor. The case of *Corder v. Morgan* (18 Ves. 334), was an advance of the law. It decided that if there was a clear power of sale given to a mortgagee, and the time for the exercise of that power arose, the Court would go far to relieve a mortgagee from the non-concurrence of the mortgagor. The importance of that case as regards sales by mortgagees can hardly be exaggerated, and its authority has never been questioned. The dictum of Sir James Wigram in *Major v. Ward* (5 Hare, 598), has no application to the present case, inasmuch as that was a conditional contract, whereas the contract in the present case is a simple contract. Upon the whole case, I think the court can only give the plaintiff the right to have the title investigated, and further consideration must be adjourned."

PUBLIC COMPANY.—*Purchase under the Provisions of the Lands Clauses Act—Notice to take land—Suit for specific performance—Not bound to proceed under act—Costs of suit not given—Delay of purchaser, interest stopped by notice that purchase-money lying idle.*—In *Stone v. The Commercial Railway Company* (4 Myl. and Cr. 122), Lord Cottenham laid it down the compulsory taking of land did, for certain purposes, establish the relation of vendor and purchaser; and in *Walker v. The Eastern Counties Railway Company* (6 Hare, 594), Wigram, V. C., held, that a person who has received notice from a company of their intention to purchase under their compulsory powers, may sustain a bill for specific performance. However, Lord Cottenham more than doubted V. C. Wigram's decision, and the case of *Adams v. The Blackwall Railway Company* (2 Mac. and Gor. 118) is an authority that the court cannot entertain a suit for specific performance founded on the mere notice, without anything more. However, where proceedings have gone on so far as that, not only is the land ascertained (which is done by the notice), but the price is also fixed by the award; the case is the same as if there had been a formal agreement for purchase; and this is probably what Lord Cottenham meant by saying that if the proceedings lead to an agreement, the court might enforce it, though originating in the compulsory power. Where a company, under the compulsory powers of its act, has given

notice to take land, and the value has been fixed pursuant to the provisions of the act by arbitration, the company may maintain a suit for specific performance, and is not bound to proceed under the powers conferred by the act. In such cases, where the delay rests with the purchaser, and the company gives the usual notice that the purchase-money is lying idle, interest stops from the date of the notice, as in the case of an ordinary purchase. *Semble*, under ordinary circumstances the court will not give a company the costs of such a suit where they might have proceeded under their compulsory powers with equal advantage. *Regent's Canal Company v. Ware*, 29 Law Tim. Rep. 274.

VENDOR AND PURCHASER.—Lien for unpaid purchase-money—Exoneration—17 & 18 Vic. c. 113.—We have before seen that by the 17 & 18 Vic. c. 113, the heir or devisee of a mortgagor, not expressing an intention to the contrary, is to bear the burden of the mortgage debt, and is not entitled to have it paid (as formerly was the case) out of the personal estate, or any other real estate, of such mortgagor. It has been decided by V. C. Stuart, that a vendor's lien for unpaid purchase-money is not a charge by way of mortgage within the above act of the 17 & 18 Vic. c. 113. *Hood v. Hood*, 5 Week. Rep. 747.

SALE OF GOODWILL—VALUATION.—Specific performance—Fixtures at a valuation to be made.—It is laid down broadly in some text books that there can be no specific performance for the purchase of a goodwill; and the opinion of Lord Eldon has been referred to as an authority; but that opinion applied to mere goodwill not dependent on the premises, and decided that you could not have specific performance of a contract for the purchase of a mere goodwill, because it would be impossible to carry out such a contract. But where it is mainly, if not entirely, annexed to the premises, there is not the smallest doubt that a contract relating to such a goodwill is subject to a decree for specific performance. The case of *Dakin v. Cope* (2 Russ. 171), and the opinions of Lord Eldon, Lord Clifford, and Sir Thomas Plumer, decided that question. Specific performance cannot be decreed of an agreement for sale or purchase at a valuation to be made by a third party, if such valuation has not been made. These observations will explain the following decision:—D. agrees with W. and another, in writing, to sell to them a lease, trade, and goodwill, subject to the rent and ordinary covenants, but free from all other incumbrances; also, to sell the tenant's fixtures, furniture, and effects, at such sum as the same should be valued at by two persons named or their umpire, and all the stock of beer, not exceeding a specified quantity, at the valuation of two licensed gaugers or

their umpire. And for the consideration aforesaid, the purchasers agreed to accept an assignment without requiring evidence of title prior to the lease, and if either party neglected to perform the agreement, he should pay to the other £150 as liquidated damages. The defendants, alleging misrepresentation—refusal to produce the lease under which the plaintiff held, and the forfeiture of the lease by change of a policy—refused to complete: Held, that all these objections were untenable; but specific performance refused, on the ground that the clause as to fixtures and stock could not be enforced. *Semble*, the court will not decree payment of a valuation to be made, but will enforce a contract for purchase of a goodwill where it is annexed to the premises. *Darbey v. Whitaker*, 5 Week. Rep. 772.

LAW OF STOP ORDERS.

Stop Order by a Trustee of a Fund in Court making Advances.

In the case of *Elder v. Maclean* (5 Week. Rep. 447), V. C. Kindersley thus stated the doctrines as to the priorities of two incumbrancers of a fund in court. "The general principle to go upon was, that where there was a fund in the hands of a trustee, and not in court in a suit, and two or more persons claimed to be equitable assignees and incumbrancers upon the share and interest of a particular individual, the priorities *inter se*, *primâ facie*, were to be determined by the priority of notice to the trustee, and if the earlier in date omitted, but the latter gave notice, the latter would prevail over the former. If the trustee was himself a person who had advanced money to a beneficiary, and had taken an equitable assignment, inasmuch as he could not give notice himself, he would prevail over any person who took subsequently. If the fund was not in the hands of a trustee, but of the court, in a suit to administer that fund, then a stop order was substituted for the notice to the trustee. What was the purpose of the notice to the trustee? It was twofold—first, that the trustee might know and take notice of the claim of the party giving the notice; and secondly, that if a person who was afterwards entitled to the share advanced money upon or purchased the share, the person to whom the proposal was made might go to the trustee to know whether he was safe. The second purpose was quite as important as the former. So when the fund was in court, what was the purpose of the stop order? Not merely to take notice of the charge, but that if any person was about to advance money on the share of a beneficiary, he might inform himself whether there was a stop order, and

could then decide as to whether he would advance his money." His Honour in the following case decided that a trustee who has himself made advances on a fund which is being administered by the court, should obtain a stop order on the fund, and not having done so was postponed to another incumbrancer, who had obtained a stop order. The facts were as follows:—A. and B. made advances to C. upon his share in a fund which is being administered by the court. A.'s advance is made long prior to B.'s, but A. does not obtain a stop order, and B. does. Between the date of B.'s advance, and the date of his stop order, an order is made directing payment to A. of part of the fund in court, in part satisfaction of A.'s debt. B., who is the plaintiff in the cause, has the carriage of this order. On the question whether the debt of A. or B. had priority: Held, that as B. had notice of A.'s debt by the order directing payment to him, A. was entitled to priority over B. *Elder v. Maclean*, 5 Week. Rep. 447.

SUMMARY OF DECISIONS.

CONVEYANCING AND EQUITY.

ADMINISTRATION SUIT.—*Creditors—Calls on shares—Specialty debt—Notice to creditors of proceedings—Future calls not to be provided for.*—In the case of an administration suit, if there is a debt due, but not payable immediately, the court makes provision for it as a *debitum in presenti, solvendum in futuro*; but if there is a liability to pay under a certain contingency, the court makes no provision for such a debt, but distributes the fund amongst the simple contract creditors, without waiting to ascertain whether the liability will ever accrue (see *Read v. Blunt*, 5 Sim. 567). These remarks will explain the following decision:—A testator in a creditor's suit is the holder of shares in a company. Two sets of calls are made on the shares, taken into the master's office, and allowed as special debts. Another call is made but not taken in, and the report is made and confirmed, dealing erroneously with such claims without notice to the company. A petition is presented, praying the correction of the report as to the calls, and to provide for further calls, and asking for the costs: Held, that the claims for the calls carried in must be allowed as specialty debts, but no provision could be made for future calls; that notice should have been given to the company of the report, and that the petitioners must have their costs. *Wentworth v. Chevell*, 5 Week. Rep. 743.

ALIEN [vol. 3, p. 241].—*Fraudulent injury to his property—Account—Injunction—Trade marks* [vol. 3, p. 126].—Every foreigner residing in this country—not, perhaps, excepting an alien enemy—has a right

to apply to the courts of this country to prevent a fraudulent injury to his property being perpetrated. Where, therefore, the plaintiffs, an American company, filed a bill against the defendant, a merchant at Birmingham, for an account, and an injunction to restrain the use of trade marks, and the defendant demurred to the bill for want of jurisdiction and equity, the demurrer was overruled. *The Collins Company v. Cohen*, 29 Law Tim. Rep. 245.

BANKER AND CUSTOMER.—*Money paid into a bankers for a special purpose not carried out—General creditors.*—In general, money paid into a banker's does not entitle a customer to receive back the same notes and sovereigns, but constitutes simply a debt. But where the money is lodged for a specific and express purpose, it is different: Thus, where money is paid into a banker's by a customer for a purpose specified, and instructions are given in writing, and those instructions are acted upon, although such sum is carried to the general account of the party paying it in, and although the money is not eventually applied, but comes again into the banker's hands after business has ceased to be carried on: Held, that it is sufficiently ear-marked to prevent its belonging to the general creditors. *Farley v. Turner*, 5 Week. Rep. 666.

CHARITY.—*Land held on charitable trusts—Alienation of—Presumption of power to sell—Statutes of Limitation—Construction of—Attorney-General—Information—Trustee and cestui que trust.*—By sec. 2 of the 3 & 4 Will. 4, c. 27, land is not to be recovered, but within twenty years after the accrual of the right. By the 24th sec. a person claiming land in equity is to bring his suit within same period as at law. By sec. 25, where the land is held upon an express trust, the right is to be deemed to have accrued at the time of a conveyance to a *bonâ fide* purchaser for a valuable consideration. Where the origin of a charity does not appear, and a sale of the charity lands has taken place at a very distant date which has since been acquiesced in, there is ground for the presumption that there was originally power to sell, or there may be such a presumption from the nature of the trust, as where the land was originally conveyed with a power to dispose of it in the way most beneficial for the charity, and not merely to apply the rents and profits to its use. Charities are trusts within the operation of the 24th and 25th sections of the Statute of Limitations (3 & 4 Wm. 4, c. 27). The poor of a parish are a class of persons within the meaning of the interpretation clause of the statute, and here a suit by information of the Attorney-General was treated as a suit by them. *Sed quæ* could they or some of them for themselves, and the rest, without the Attorney-General, maintain such a suit. Where the Attorney-

General has no independent title of his own, and the parties whom he represents are bound by the statute, he also is bound. The effect of the 25th sec. is to save the cestui que trust, in this case the poor of the parish, against the trustees, but not against purchasers for value from the trustees. *Seem*, under the 25th sec. the remedy of a cestui que trust against his trustee (upon express trusts), and those claiming under him, is not barred by the statute, though the estate has been conveyed away; but as against a purchaser for valuable consideration from the trustee, the right to sue begins from the date of the conveyance. *The Attorney-General v. Magdalen College, Oxford*, 5 Week. Rep. 716; 29 Law Tim. Rep. 238.

CONVERSION [vol. 3, pp. 34, 369].—*Reconversion*—*Part reconversion not entire reconversion*—*Part in possession and part in reversion*.—Where an estate is directed to be sold, and the proceeds are bequeathed to A. B., and the estate remains unsold, and A. B. by his acts treats part of the estate as land, this is considered a reconversion of the whole. But this doctrine applies only to cases where, to use the language of Lord Eldon in *Wheldale v. Partridge* (8 Ves. 227), the property is at home. In other words, the use or equity once impressed by the original conversion, continues until the estate becomes vested in some person or persons. Acts of reconversion as to part of an estate frequently are held to apply to the entirety, but an intention to reconvert freeholds in possession is no evidence of reconversion of copyholds not in possession. A residuary bequest of real estate directed to be sold, comprised certain freeholds in possession, and also a reversion in a copyhold estate, which did not fall into possession till after the death of the legatee: Held, that acts by the legatee amounting to a reconversion of the freeholds into land did not operate to reconvert the copyholds; and that they passed to the personal representatives and not to the heir. *Meredith v. Vick*, 5 Week. Rep. 639.

DEVISE.—*Charitable uses*—*Mortmain*—*Void devise and bequest attending it*—*Gift over defeated*—*Administration*.—Where a devise of realty for a charitable foundation is void under the Mortmain Act, a bequest to residuary legatees in trust to carry out the purposes of the devise fails too; and a bequest over, where the prior bequest is defeated by contingencies other than those provided for by the testator, is also void. Supporting the case of *Philpotts v. St. George's Hospital* (21 Beav. 131), administration, with will annexed, granted to next of kin in preference to residuary legatee, for the purpose of carrying out the intended charity. *Rudall v. Warren*, 29 Law Tim. Rep. 204.

ELECTION.—*Dower*—*Direction to sell*—*Part of*

proceeds given to wife.—Where a testator gives all his estate, it is not to be supposed that he intended to give that which is not his—namely, his wife's dower (*per* Lord Thurlow, in *Foster v. Cooke*, 3 Bro. C. C. 347). In order to imply an intention to bar dower the instrument must contain some provision inconsistent with the assertion of a right to demand a third of the lands to be set out by metes and bounds, i. e., the wife's dower (*Birmingham v. Kirwan*, 2 Sch. and Lefr. 444). A mere direction to sell and divide the proceeds amongst the widow and others does not put her to her election. This will explain the following decision. A., by his will, directed the sale of all his freehold and copyhold estates, and bequeathed half of the proceeds of such sale to his wife absolutely. By his codicil he directed that his personal estate should be divided in the same manner as the proceeds of his real estate. He married prior to 1834. V. C. Wood held, that his widow could not be required to elect between the bequests under her husband's will and codicil, and her dower. *Bending v. Bending*, 29 Law Tim. Rep. 224; 3 Jur. N. S. 535.

EQUITABLE MORTGAGE.—*Priority*—*Notice*.—The Master of the Rolls in the case of *Jones v. Williams* (5 Week. Rep. 540; *ante*, pp. 20, 21), held that a deposit of deeds which do not relate to the property over which the charge is claimed does not create any equitable mortgage over it. If a deposit of the deeds of Blackacre is made with an assurance that they relate to Whiteacre, that will not create a charge on Whiteacre as against a third party with whom the deeds of Whiteacre may be deposited, although the depositor himself might be compelled to make his representation good. That was the principle of *Jones v. Williams*. It is not to be considered that every equitable mortgage is bad unless the deeds deposited show a good title in the depositor. Thus it was decided in the following case, that a prior equitable mortgage will not be postponed to a subsequent one, merely on the ground that the deeds first deposited did not include the conveyance to the depositor, and showed no title in him. *Roberts v. Croft*, 5 Week. Rep. 778.

EQUITABLE WASTE [vol. 3, p. 44].—*Ornamental timber*—*No residence on estate*—*Injunction*—*Tenant for life without impeachment for waste*.—It is well settled, the most recent authority being that of *Marker v. Marker* (9 Hare, 1), that a tenant for life, even though unimpeachable for waste, cannot cut down any timber left for ornament; and anything either originally planted or left for ornamental purposes is beyond his power. The original ground of the equitable jurisdiction was as to malicious waste; but ever since the well-known case of *Raby Castle* (1 Salk. 161; 2 Vern. 738), that doc-

trine has been extended to plantations for ornament to a house and buildings. Lord Eldon, though he was stated to have been averse to extending the doctrine, observed, in *Marquis of Downshire v. Sandys* (6 Ves. 107), that the principle had been extended from ornament of the house to outhouses and grounds, then to plantations, vistas, avenues to all the rides about the estate for ten miles round; and his lordship did not hesitate to say, that it must also be applied to an unenclosed common as well as to field lands, and that the contiguity or remoteness, if *de facto* it was planted for ornament, could not alter the principle. In *Wombwell v. Belasyse* (6 Ves. 110 n.), Lord Eldon stated, as established doctrine, that "the question is not whether the timber is or is not ornamental; but the fact to be determined is, that it was planted for ornament; or if not originally planted for ornament, that it was left standing for ornament by some persons having the absolute power of disposition."—"I do not agree that a mere tenant for life coming into possession can vary the estate; that can be done only by some person having the absolute dominion over it"—the same dominion in fact as the person who planted it. These observations will explain the following decision:—A. B. was owner in fee of two estates, L. and M., within eight miles of each other. In 1823 he ceased to reside at L., and went to live at M. In 1845 he pulled down the mansion upon the L. estate, and cut down a few of the trees in the park. He died in 1856, leaving C. D. entitled under his will as tenant for life, without impeachment for waste, to L. and M., the will containing a leasing power over all the real estate, except the mansion at M., and also a power of sale and exchange. Injunction granted to restrain C. D. from cutting down the trees in the avenue or park at L.—the circumstances of pulling down the mansion and felling some of the trees by the testator, and the power of leasing, not being sufficient to deprive the timber upon the estate of its ornamental character. Timber may be planted or left standing for ornament by the owner of an estate, and as such protected by a court of equity, although there is no residence upon the property. *Micklethwait v. Micklethwait*, 5 Week. Rep. 640.

EXECUTOR.—*Duty of*—*Devastavit*—*Residuary legatee*—*Rights of*—*Delaying conversion beyond proper time*—*Effect of debts not being paid*—*Charging executor for breach of duty*.—In general a person having a life interest in a residue has a right to call on the executors or trustees to convert into money all personal property of a perishable or speculative character—everything in short not consisting of proper securities for money, so that it may be properly invested. But of course a testator may, as between himself and his legatees, modify that right

by directing expressly or impliedly that any particular item of property shall not or need not be sold; but this direction, even if given by the will, is a direction not coming into operation till the property has reached the hands of the trustees; that is, not until the debts have been previously paid. A testator by his will gave his residuary real and personal estate to trustees upon trust at some convenient and proper period, with the approbation of his son, S. W., to sell and to pay to his daughter L. such annuity as should be £200, besides one-half of the yearly income and produce of his residuary real and personal estate, but not to exceed £600 a year, and so that any annual surplus after paying such annuity to L., and an annuity of £400 to S. W., should go to S. W., who was residuary legatee and co-executor with the trustees. The trustees disclaimed, and S. W. alone proved the will. Part of the testator's property included in the gift to the trustees was a leasehold colliery which S. W. did not sell, but carried on until it was worked out, laying by 10 per cent. to pay back capital expended in the plant, &c., according to a direction in the will. Considerable profits were realised by the working, and the testator's estate, independent of the colliery, was insufficient for the payment of his debts. The deficiency was paid by S. W., who also paid to L. £600 a year out of the profits of the colliery while it was worked. Upon bill filed by L. against S. W. for an account: Held (affirming decree of the Lords Justices), that the duty of S. W. as executor was to have sold the colliery before the end of a year after the testator's death, notwithstanding that the trustees were to sell with his approbation, and that the will afforded an implication that it need not be sold: Held, also (Lord Wensleydale, *dubitante*), that S. W. was chargeable with the value of the colliery at the end of the year, and interest at £4 per cent., the value being a sum equal to the aggregate amount of the net profits made from that time treated as deferred payments. *Wightwick v. Lord*, 5 Week. Rep. 719.

FIXTURES [vol. 3, pp. 87, 301].—*Factory*—*Machinery*—*Looms*.—Upon the sale of a mill or factory, looms used in the mill are not within the words steam engines, boilers, shafting, piping, mill gearing, gas meter, gas pipes, drums, wheels, and all and singular other the machinery, fixtures, and effects, fixed up in, or attached or belonging to the mill or factory or premises. Looms standing upon a loom-foot, from which they may be removed at pleasure, will not pass by the general terms of machinery, though they are worked by steam power which is attached to the mill and mortgaged with it. *Hutchinson v. Kay*, 26 Law Journ. 457, C.

LEASE.—*Breach of covenants*—*Equitable relief*.—

The plaintiff being the mortgagee of the lessee of a house under a building lease, took possession of the property upon the original lessee neglecting to fulfil the covenants. The plaintiff was afterwards ejected in pursuance of a judgment in an action at law for breach of covenants, and filed a bill to be reinstated in the property, on the ground that there had been no breach of the covenants under the lease. The particular covenants as to which relief was prayed were to make and provide a roadway in front of the house, and to construct good and sufficient drains and sewers to carry off the foul water. The plaintiff excused himself from performing the first covenant, on the ground that the owners of the adjoining house refused to complete their portion of the road; and as to the second covenant, the plaintiff had caused drains to be made by competent workmen, but they were found to be insufficient for the purpose. The court held that there had been a breach of both covenants, and therefore refused to interfere to prevent the lessor from having the benefit of his ejectment. *Nokes v. Gibbon*, 26 Law Journ. 488, C.

MERGER [vol. 2, pp. 235, 254].—*Purchase of term by lessor—Assignment to trustee—Merger prevented.*—When a charge secured by a term of years is paid off, the term is presumed to be merged, unless evidence is offered to rebut the presumption, and the burden of proof lies on those who maintain that the term is subsisting. But where the mode in which the charge is paid off appears to be framed with a view to prevent a merger of the term, the burden of proof is shifted, and the presumption is that the term is intended to be kept on foot. It must then be proved that notwithstanding the particular form of the transaction, still it was intended to merge the term. In the following case, it was held by the Master of the Rolls that where a lessor purchases the interest of the lessee in a term, and causes it to be assigned to a trustee in trust for him, the presumption is that he intended to prevent a merger. *Gunter v. Gunter*, 29 Law Tim. Rep. 244.

MORTGAGE.—*Mortgages in possession—Distress—Neglect and default.*—A mortgagee in possession is bound to take all steps, and use all remedies which a prudent man would use under the circumstances with reference to his own private property. In the following case, it appeared that a mortgagee in possession distrained upon goods the property of customers; he afterwards, under threat of legal proceedings, restored the goods so seized: Held, that he was not obliged to defend his seizure in an action at law; and that he was not, under the circumstances, answerable for wilful neglect and default. *Cox v. Grey*, 5 Week. Rep. 749.

MORTGAGE.—*Mortgagee suing after foreclosure—Costs—Admitting to prove in administration suit.*—

A mortgagee, after foreclosure and attempted sale, was admitted to prove in an administration suit on giving up the property; but not allowed costs of foreclosure. *Haynes v. Haynes*, 3 Jur. N. S. 504.

PUBLIC COMPANY.—*Joint-Stock Company's Winding-up Acts—Contributory—Partnership—Misinformation as to limited liability.*—A. and B. were partners, and A., on the faith of representations made to him by the secretary of a company, informed B. that the liabilities were limited, and thereupon B. consented to shares being taken in the company. A. executed the company's deed alone, in the name of the firm. Two calls were paid by the firm, and dividends were received by the firm as part of the partnership assets. The firm then dissolved partnership, and all the assets and liabilities (the above shares being particularly specified) were transferred from A. to B. The company failed, and was wound up under the act. It then appeared that the liabilities of the company were not limited, and B. alleged that A. alone was liable as a contributory: Held, the misrepresentation as to the limited liabilities not being wilful, and the company assenting, that B. was primarily liable, and A. secondarily liable, as contributories. *Exp. Letts v. Steer*, 26 Law Journ. 455, C.

PUBLIC COMPANY [vol. 3, pp. 49, 130, 372, 304].—*Agreements by promoters.*—Agreements entered into by promoters of a company before the act of incorporation, do not bind the company without subsequent adoption (see vol. 3, p. 130). In the following case, what amounts to adoption was considered. *Williams v. St. George's Harbour Railway Company*, 5 Week. Rep. 725.

SEPARATION DEED.—*Reconciliation—Statute of Frauds—Part performance—Annuity—Agreement to charge real estate.*—The Statute of Frauds, which was passed to prevent fraud, will not be allowed in equity to be made the cloak or instrument of fraud. A parol agreement to secure an annuity on lands of the grantor, followed by part performance by the grantee, will be upheld in equity. After a separation deed had been executed by which a husband covenanted to pay a certain annuity to his wife, a reconciliation was effected, the husband verbally promising to secure the said annuity on his real estate, and the wife returning to live with him accordingly: Held, that her return constituted a sufficient part performance to take the case out of the Statute of Frauds, and to render the real estate liable to such an annuity in the hands of the devisee of the husband. *Webster v. Webster*, 5 Week. Rep. 725.

SUCCESSION DUTY [vol. 3, pp. 48, 224, 388].—*Act of Parliament—Remainder-man.*—The estate of a remainder-man, which was vested before the

Succession Duty Act, 18 & 19 Vic. c. 51, came into operation, but fallen into possession upon the death of the tenant for life, after the time appointed for the commencement of the act, but before the time when it received the royal assent, is liable to succession duty. *Wilcock v. Smith*, 29 Law Tim. Rep. 235.

SURETY [vol. 3, pp. 88, 212].—*Difference between giving time to debtor and releasing debt, with reservation of rights against surety.*—The following case shows the great difference existing in equity between giving time to a debtor to pay, and releasing the debt where there has been a surety, and there is a reservation of the creditor's rights against him. It was there decided by V. C. Wood that where a creditor gives time to his debtor, and at the same time reserves his right against his debtor's sureties, they are not discharged; but where there has been an actual release of the debt, no such right can be reserved against the sureties. The plaintiff entered into a bond as surety for a debtor, conditioned for the repayment of moneys advanced and to be advanced to the debtor by his creditor. The moneys were advanced by the creditor. The debtor and creditor afterwards entered into a written agreement, in consideration of the debt then due, of other payments made and to be made, and of a general release to be executed by the creditor, for the surrender and assignment to the creditor of certain premises demised to the debtor. The surrender and assignment were duly made, but no general release was ever executed: Held, that although there was no discharge of the surety at law, in equity he was released from his liability on the bond. The court refused to admit evidence on the part of the defendant, dehors the written agreement and repugnant to it, to show an intention to reserve a right against the surety. *Webb v. Hewett*, 29 Law Tim. Rep. 225.

TENANT FOR LIFE.—*Order to produce cestui que vie*—6 Anne, c. 18—*To whom application made.*—The application for the production, under the 6 Anne, c. 18, of a *cestui que vie* in the case of a tenancy for life is to be made to "the Lord Chancellor, keeper or commissioner for the custody of the Great Seal of Great Britain for the time being," and therefore the Master of the Rolls has no jurisdiction under the statute. *Meyrick v. Lawes*, 5 Week. Rep. 746.

TRUSTEES.—*Devise upon trust for sale—Mortgage, not a compliance—Trust for sale does not authorise mortgage.*—The case of *Stroughill v. Anstey*, (1 De Gex. M. and G. 635), established that as a general rule, a mortgage is not a due execution of a trust for conversion. In the following case, property was devised upon trust for sale as soon as might be after the decease of the testator, and the trustees mort-

gaged the property for payment of debts and certain legacies, but took no steps to sell the estate for five years after the death; it was held that they were liable for a loss which accrued in consequence of their neglect to execute the trust, from the property having become depreciated in the meantime. *Devaynes v. Robinson*, 29 Law Tim. Rep. 244.

WILL.—*Probate—French domicil—Authorisation of the Emperor.*—The following is the decision respecting the validity of the will of a person domiciled in France about which so much has lately been said, and which has occasioned the introduction of a bill into Parliament to remedy the difficulty for the future. A testamentary instrument duly executed according to English law by a British subject, whose legal domicil was at Paris both at the time of the execution of the instrument in question and at the time of her death, cannot be admitted to probate if the party propounding the alleged will fails to prove that the law of the domicil was such as to authorise a will in that form. The authorisation of the Emperor of the French is not necessary in order to establish a domicil to give the rights of testacy, and regulate the succession of property. *Bremer v. Freeman*, 5 Week. Rep. 618.

EQUITY PRACTICE.

ANSWER.—*Witness—Privilege—Question tending to criminate—Exceptions to answer.*—A defendant is not, as a general rule, at liberty to decline to answer interrogatories, upon his mere statement upon oath that such answer might subject him to prosecution. The court will decide whether, under the circumstances, such a statement ought to be considered conclusive. V. C. Stuart declined to follow the decision in *Fisher v. Ronalds* (17 Jur. 898), to the effect that it is enough for the person interrogated to state upon his oath that he considers, or has been advised, or that it is his opinion, that his answering a particular question would tend to criminate him, and that the witness is the sole judge upon the neglect. *Sidebottom v. Adkins*, 3 Jur. N. S. 631; 5 Week. Rep. 748.

COSTS.—*Trustees appearing separately* [vol. 2, p. 162]—*Costs, double set allowed.*—In general trustees should join in defending proceedings in equity, otherwise they will be allowed one set of costs only (see 2 Chron. p. 162). A hostile claim was filed for an account and administration against three trustees, only one having ever acted, and the acting trustee resided in a different part of England from the other two. No unreasonable conduct was proved against the acting trustee: Held, that he was justified in appearing separately from his two co-trustees; and a double set of costs was allowed. *Cummins v. Bromfield*, 3 Jur. N. S. 657.

DISCOVERY.—*Heir-at-law*—*Pedigree*—*Entail*—*Outstanding term*—*Ejectment*.—Where a plaintiff in equity claims as heir-in-tail, it has been held that he has a right to have the deeds creating the entail, and also the deeds leading up to the creation of the entail, produced by any opposing claimant, who seeks to obtain possession, denying the heirship, but admitting the entail, because the deeds creating the entail and the documents on which it rests, are assumed to be the common title of both parties. But upon consideration, it is plain that the decision in such a case would have no application to a case where the heir claims as heir general. In the following case, it appeared that a person claiming to be heir-at-law brought ejectment, to which the defendant was about to set up as a defence an outstanding term. The heir thereupon filed his bill for a production of the instrument creating the term: Held, that he was not entitled to the production, except as to so much (if any) of the deed as showed or tended to show the plaintiff's pedigree, and that the rest of the deed might be sealed up. *Rumbold v. Forteach*, 3 Jur. N. S. 657.

DISMISSAL OF BILL.—*Reversal of decided cases*—*Amendment*—*Dismissal of bill by plaintiff*—*Costs*.—If a plaintiff files a bill on the authority of decided cases, and those cases are afterwards reversed, he is entitled to move to dismiss his bill without costs. The court gave leave to a plaintiff to amend his bill on payment of costs to the defendant. The plaintiff, accordingly, amended the bill, and proceeded with the suit. It was afterwards discovered that there was an express clause in a statute which rendered the bill unsustainable. The plaintiff was allowed to dismiss his bill without costs, on the ground that the prosecution of the suit was caused by a mistake of the court. *Lister v. Leather*, 5 Week. Rep. 666.

DISMISSAL OF BILL.—*After decree*—*Waiving relief*—*Preliminary inquiries*.—Where after decree, in consequence of a previous technical irregularity, the bill is dismissed against a party having a reversionary interest under a settlement sought to be impeached, and preliminary inquiries are directed, the court under the special circumstances will order the decree to be prosecuted against the other parties only, the plaintiff waiving all relief against the party dismissed. *Chaffers v. Daker*, 5 Week. Rep. 515.

ELECTION.—*Infant*—*Reference to chambers*.—An infant heir-at-law may elect with the sanction of the court, without a reference to chambers. *Lamb v. Lamb*, 5 Week. Rep. 772.

EVIDENCE [vol. 3, pp. 127, 298].—*Time for closing evidence*—*Leave to file further affidavits*—15 & 16 Vic. c. 80, s. 38.—After the time for closing the evidence in a cause has expired, the court may,

under 15 & 16 Vic. c. 80, s. 38, allow affidavits to be filed in reply to an affidavit filed immediately before the time for closing evidence, impugning the character and credibility of the witnesses of the party in whose behalf the application is made. *Scott v. Corporation of Liverpool*, 5 Week. Rep. 641, 669; 29 Law Tim. Rep. 223.

FEME COVERT.—*Marriage after replication*—*Separate estate*—*Revivor*—*Next friend*.—A., a feme sole entitled to property, which in the event of her marriage would be settled for her separate use, filed a bill for purposes connected with such property. After replication, but before decree, she marries. The Court made an order, giving leave to the plaintiff to name A. B. her next friend, and reviving the result against her husband. *Semble*, such an order is not an order of course. *Trezevant v. Broughton*, 5 Week. Rep. 517.

HEARING.—*Last cause in list not privileged*.—Formerly, the last cause in each day's list of causes for hearing was considered privileged, so that it could not be taken in the absence of counsel; but this rule of practice has been abrogated, and now the last cause in the paper is not privileged, but the plaintiff is entitled, in the absence of the defendant's counsel, to a decree or order on affidavit of service. *Flower v. Gedge*, 5 Week. Rep. 747.

INFANT.—*Infant suing in formâ pauperis by next friend* [vol. 3, pp. 45, 318].—An order for an infant to sue by next friend in *formâ pauperis* is irregular. *Lindsey v. Tyrrell*, 5 Week. Rep. 617.

MORTGAGE.—*Solicitor*—*Costs*.—A mortgagee is entitled, as against his mortgagor, to have taken into account, in a suit to redeem him, any costs which he has incurred in protecting his title to the mortgaged property. On the other hand, though a mortgagee may be entitled to certain expenses properly incurred in relation to the mortgaged property, as the expenses of employing a collector, yet he cannot himself charge for his own trouble. Where a mortgagee acts as his own solicitor in a suit in defence of his own title, he will be allowed, as against a second mortgagee, his costs out of pocket, but no other costs—that is, the mortgagee is entitled to what he has disbursed, but not to that which is the remuneration for his own personal trouble. *Slater v. Cottam*, 3 Jur. N. S. 630.

PRODUCTION OF DOCUMENTS.—*Privileged communications*—*Co-defendants*.—In general every thing and document within the knowledge or in the possession of a party to a suit in equity must be disclosed. But in order that there should be free communication between the parties to a suit and their legal advisers, such communications are privileged from production, and this has been extended to the legal advisers and the witnesses in the suit

(*Curling v. Perring*, 2 Myl. and Ke. 380; *Holmes v. Baddeley*, 1 Phil. 476). But it has been decided by V. C. Wood, that communications between co-defendants in reference to the matters in question in the suit are not entitled to protection. *Betts v. Menzies*, 5 Week. Rep. 767.

PRODUCTION OF DOCUMENTS [vol. 3, pp. 35, 127, 375, 398].—*Applying immediately after filing answer*.—By the 19th sect. of the 15 & 16 Vic. c. 86, it is provided that it shall be lawful for the defendant in any suit, whether commenced by bill or claim, but in suits commenced by bill, which the defendant is required to answer not until after he shall have put in a sufficient answer, to file interrogatories for the examination of the plaintiff. A defendant after filing his answer, may apply for production of documents under the above statute, although the six weeks during which the answer is open to exceptions has not elapsed. *Walker v. Kennedy*, 3 Jur. N. S. 481.

PUBLIC COMPANY.—*Costs—Application respecting payment of dividends on purchase-money to tenant for life*.—Where a tenant for life might, but for disputes between himself and his incumbrancers, have obtained an order for payment of dividends to himself of a fund in court on a former occasion, he will not be allowed as against the company the costs of an additional application relating to the dividends. A public company having purchased lands for the purpose of their act, and paid the money into court, it is competent for the court, the whole matter being before it, not only to order the transfer into the separate account of the landowner having a limited interest, but also by the same order to direct payment of the dividends according to the rights of parties. *Re Jolliffe*, 3 Jur. N. S. 638.

SETTLED ESTATES ACT [ante, p. 24].—19 & 20 Vic. c. 120—*Examination of married woman—Scotland, writer to signet*.—The Settled Estates Act is giving rise to many applications, and several points have been decided on the practice, and among others the following:—The examination of a married woman applying to the court under 19 & 20 Vic. c. 120, may be taken after the presentation of a petition at any time before it is heard. A writer to the signet will not be appointed to take the consent of a married woman residing in Scotland. *Re Hooper's Settled Estates*, 5 Week. Rep. 670; but see *Id.* 726.

SETTLED ESTATES ACT [ante, pp. 22, 24].—19 & 20 Vic. c. 120—*Examination of married woman* [ante, pp. 22, 24].—The examination of a married woman applying to the court under the Leases and Sales of Settled Estates Act (19 & 20 Vic. c. 120) should be taken immediately after the presentation of the petition. *Re Foster's Settled Estates*, 5 Week. Rep. 726.

TRUSTEES.—*Appointment of new trustees—Disclaimer—Costs—Jurisdiction—Trustee Act*.—A stranger who, in a case involving no risk or responsibility, obstructs the true owner, by refusing to claim or disclaim will be made to pay the costs of any consequent proceedings. On a petition, under the Trustee Act, 1850, for appointing a new trustee, the court has no jurisdiction to make the respondents pay the costs of the application. *Re Primrose's Settlement*, 5 Week. Rep. 508.

TRUSTEE.—*Cestui que trust using name of—Appeal—Trustee of appellants the solicitor also of respondent—Indemnity—Costs*.—A trustee cannot, upon receiving a proper indemnity, refuse the use of his name to his *cestui que trust* for the purpose of prosecuting an appeal in the House of Lords. A defendant in a suit was the trustee of appellants from a decree pronounced in it, and also the solicitor of a respondent on the appeal. The defendant gave the appellants an authority to use his name in their appeal, but subsequently withdrew that authority, on the grounds that he thought the appeal unreasonable, and that he was the respondent's solicitor. The appellants offered to indemnify him against the costs of the appeal on a claim filed by them, claiming to be allowed to prosecute their appeal in the name of the defendant: Held, that they might use his name on a complete and sufficient indemnity being given, the indemnity to be settled in chambers; and that the defendant must pay the costs of the claim. *Pakington v. Benbow*, 29 Law Tim. Rep. 194; 5 Week. Rep. 670.

TRUSTEE RELIEF ACTS.—*Costs—Party served with petition and appearing*.—A party served with a petition under the Trustee Relief Act, 1847, does not necessarily get his costs of appearing at the hearing of the petition. *Re Smith, exp. Fisher*, 3 Jur. N. S. 659.

COMMON LAW.

AGENT [vol. 3, pp. 49, 298, 310].—*Damages—Contract by unauthorised agent*.—An unauthorised agent assumed to enter into a contract on behalf of R. for the purchase of a ship then building, and he required certain extra work to be done which came to £250. Afterwards R. repudiated the contract, and the ship was resold at a loss of £250: Held, that the damages resulting from the breach of the defendant's engagement that he had authority to make the contract for R. were, as well the £250 loss on resale as the £250 for the work which the agent specially required to be done. *Simons v. Patchett*, 29 Law Tim. Rep. 88.

ATTORNEY.—*Witnesses' expenses—Experiments—Liability of attorney for expense of surveys by witness to qualify himself*.—It is a well-established rule of

law that where a person is presumably acting as agent for another, the principal is bound and not the agent; an attorney is certainly in that position; he is the agent of his client, and is acting in pursuance of instructions. The authorities to that effect are *Robins v. Bridge*, 3 M. and W. 114; *Walbank v. Quatermaine*, 8 C. B. 96; and *Hartup v. Jukes*, 2 M. and S. 488. Upon the authority of these cases it has been decided that an attorney who employs a surveyor to make surveys and valuations in order to qualify himself to give evidence at a trial on behalf of his client, is not liable to the surveyor for the expense of the surveys and his attendance to give evidence. The witness must, in the absence of express stipulation, look to the client for payment. *Lee v. Everest*, 5 Week. Rep. 759.

BILLS OF SALE [*ante*, p. 25].—*Execution creditor—Jus tertii—Prior invalid bill of sale.*—An interpleader issue is merely to satisfy the conscience of the court whether the execution creditor or the claimant is entitled to the goods. In an interpleader issue to try the right of the plaintiff as assignee under a bill of sale, to goods claimed by the defendant as execution creditor, the defendant will not be allowed to set up, as a bar to the plaintiff's claim, a prior bill of sale, which, though good as against the assignor, is void as against the defendant on account of a non-compliance with the Bills of Sale Registration Act. *Edward v. English*, 5 Week. Rep. 507.

BILL OF EXCHANGE.—*Indorsement on face of a bill.*—The writing of his name by an indorser on the face of a bill of exchange, is a good indorsement. *Young v. Glover*, 3 Jur. N. S. 637.

CLUB.—*Liability of member—Authority of secretary.*—According to the law laid down in *Fleming v. Hector* (2 M. and W. 172), the members of the club are not responsible for goods supplied on the order of the secretary, each member having previously made payments into his hands sufficient to pay for the goods supplied to him; but it is very different where the secretary is merely directed to order the goods of a particular person who is to be paid at a particular time. Thus, where a coal club entered into a contract with a merchant to supply them with coals, and authorised their secretary to order the coals for them, and by a rule of the club the coals were to be paid for out of the funds of the club, in the hands of the treasurer, by means of an order given to the merchant on the next Thursday night after each delivery of coals, signed by the secretary and chairman of a meeting of the club: Held, that as the members of the club did not furnish the secretary with funds to pay for the coals, but authorised a contract on credit, the contract so made must have been on their credit, and not on that of the

secretary, and they were consequently liable to pay for the coals. *Cockerell v. Aucumpte*, 5 Week. Rep. 683.

DECLARATION OF WAR.—*Effect of on contracts—Neutral vessels.*—It is established that inasmuch as the presumed object of war is as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal. Doubt was, indeed, thrown upon the law on this subject by *Bell v. Gilson* (1 Bos. and P. 345, A.D. 1798), where Buller and Heath, JJ., held that the insurance of goods purchased in Holland during hostilities between England and Holland, on board a neutral ship, was lawful. That case was, however, in the year 1800, overruled by the Queen's Bench, in *Potts v. Bell* (8 Term Rep. 548), which, together with the great case of *The Hoop* (1 C. Rob. 196, A.D. 1799), before Sir Wm. Scott, then restored and finally established the rule already mentioned—viz., that one of the consequences of war is the absolute interdiction of all commercial intercourse or correspondence between the subjects of the hostile countries, except by the permission of their respective sovereigns. *Per Willes, J.*, in *Esposito v. Bowden*, 5 Week. Rep. 732.

EASEMENTS.—*Water rights, natural and acquired—Riparian proprietors—Usage—Diversion—Detention—Right of action.*—As a general principle, the proprietor of lands on the banks of a natural stream has a right to use the water, so as not to work any material injury to the rights of proprietors above and below him, whether he does actually use it or not. Such a proprietor may, by usage, have a greater right, not justified by his natural rights. But an acquired right does not operate on the natural rights of a landowner above, unless the user by which it was acquired affected the power to use the water above, so as to raise the presumption of a grant. *Simpson v. Addington*, 26 Law Journ. 148, C. P.

EQUITABLE DEFENCES [vol. 3, pp. 301, 324, 345].—*Railway company—Companies Clauses Consolidation Act, 8 & 9 Vic. c. 16, s. 36—Shareholder—Equitable plea—False representation—Scire facias.*—It is a rule that no plea ought to be entertained as an equitable plea unless the court, in deciding on the points and merits of the plea, can do the entire justice between the parties that the case requires. To a *scire facias* against a shareholder in a railway company incorporated by statute, on a judgment obtained against the company, the defendant pleaded, for defence on equitable grounds, that he became transferee of the shares he held in the company as nominee of E. and M., for their benefit,

and not for his own, upon the representation of the plaintiff and others that he should incur no liability in respect of them; that he never was to derive or did derive any benefit from the shares of the company; that the company never commenced the railway, and the scheme was abandoned, and no benefit was ever acquired by the company; that the plaintiff knew the circumstances under which the defendant became transferee of the shares, and stood by and permitted him to become such, &c., and was then unjustly and inequitably, and contrary to that representation, and in fraud thereof, seeking to charge the defendant, and make him responsible as a shareholder: Held, bad on demurrer. *Bell v. Richards*, 3 Jur. N. S. 521.

FALSE IMPRISONMENT.—*Estoppel—Arrest by sheriff of wrong person on misrepresentation.*—Though a sheriff may justify the arrest of a person representing himself to be the party against whom the writ is issued, yet he cannot justify the subsequent detainer of such person after information, even though given by such arrested person only, that he is not the party against whom the writ was issued. Action against the sheriff for false imprisonment. Plea, that the plaintiff represented herself to be a person against whom a writ of *ca. sa.* had issued to the defendant. New assignment, that the defendant detained the plaintiff in custody after she had informed him that she was not the person. Rejoinder, that the plaintiff was lawfully in custody in the first instance, and that the subsequent imprisonment was a continuation of that: Held, that the plaintiff was not estopped from denying that she was the person against whom the writ had issued. *Dunston v. Paterson*, 29 Law Tim. Rep. 199.

FRIENDLY SOCIETY [vol. 2, pp. 62, 136—9, 167, 269].—*Appointment of trustees*—13 & 14 Vic. c. 115; and 18 & 19 Vic. c. 63.—Where trustees of a friendly society, established under 13 & 14 Vic. c. 115, were appointed after 18 & 19 Vic. c. 63 (see 2 Law Chron. 62, 63) had become law: Held, that it was not necessary to send to the registrar the resolution appointing the trustees; and that such trustees were liable to be sued for the debts of the society incurred before their appointment. *Beckett v. Willets*, 5 Week. Rep. 622.

ILLEGAL ARREST.—*Attorney and client—Liability of attorney—Liability of client for illegal arrest upon ca. sa. where the sum recovered under £20—7 & 8 Vic. c. 96, s. 57* [see vol. 1, p. 275; vol. 2, p. 224].—The following case is a very important one with respect to a client's liability for the act of his attorney. There is a great difference between the employing of an attorney who represents the parties in a suit, and the employing a contractor to do some other piece of work different to the carrying on a

suit at law—such as building a house, &c., where the employer is not liable for the acts of the person who contracts to do the work, but the contractor is; but it has always been held that a man is liable for the acts of his attorney in the conduct of a suit at law brought under his authority. He gives to the attorney the right to represent him, and for whatever the attorney does he is responsible. The following case was decided upon these principles:—An attorney issued a *ca. sa.* upon a judgment where the real sum recovered by his client upon that judgment was under £20. The judgment debtor (the above-named plaintiff) was arrested, but subsequently, the writ was set aside, and he was discharged. Evidence was given to show that the judgment creditor (the above-named defendant) knew of the arrest, and was in communication from time to time with her attorney, who issued the *ca. sa.*: Held (*dubitante*, Bramwell, B.), that the client (the judgment creditor) was liable for the act of her attorney in issuing the *ca. sa.* and arresting the plaintiff, in an action by him, against her, for false imprisonment. *Collett v. Foster*, 29 Law Tim. Rep. 229.

INTESTACY.—*Administration—Widow and next of kin—Committee of lunatic widow.*—Where a person dies intestate without child or parent, leaving a widow who is lunatic, it is the practice of the Prerogative Court Registry to make a grant of administration to the committee of the widow without citing the next-of-kin; the court, however, is not bound by that practice, but may, where the next-of-kin appears and shows sufficient reason, grant administration to them. A. died intestate without child or parent, leaving his widow, his brother, and others entitled in distribution, him surviving. The widow became lunatic, and a committee of her person and estate was appointed by the Court of Chancery. On the question of grant of administration, it was held that the ordinary preference by the discretion of the court in favour of the widow would extend to such committee, unless the next-of-kin could show special cause to the contrary. *Alford v. Alford*, 29 Law Tim. Rep. 284.

LANDLORD AND TENANT.—*Damages for not quitting after notice and delivering up possession* [vol. 3, p. 302].—A tenant who holds over after a notice to quit has expired, and after he has received notice from his landlord that the premises have been let to another, is liable, in an action by the landlord, for damages for the loss sustained by him in consequence of his being unable to perform the contract which he had entered into, to deliver possession to the in-coming tenant. *Quære*, whether an action of assumpsit could be maintained on the implied promise

to deliver up possession at the end of the term. *Bramley v. Chesterton*, 29 Law Tim. Rep. 227.

LIFE INSURANCE.—*Action on policy—Evidence of valid contract—Company established under 7 & 8 Vic. c. 110—Powers of directors presumed* [vol. 3, p. 372].—Where an insured person sues the company, he is not obliged to produce the deed of settlement of the company, and show that the contract was entered into with all due formality according to the deed: where the contract has been acted on, the court will intend, unless the contrary is proved, that the deed of settlement authorises the directors to enter into the contract sued on (see *Smith v. Hull Glass Company*, 8 Com. Ben. R. 668). In an action on a life policy granted by an insurance company established under the 7 & 8 Vic. c. 110, the plaintiff produced the policy signed by three directors, and gave evidence of the proposal and acceptance of the life, the delivery of the policy by the company, the receipt of premiums from time to time on the part of the company, and a letter received from the company after the life had dropped, admitting the validity of the policy, but setting up matters of defence to the claim, which turned out untrue: Held, that it was the duty of the jury to presume from these facts, that the contract was a valid and binding one, and in accordance with the powers of the directors, and that any matter of defence, such as that the contract was not executed in the manner required by the deed of settlement, or not under seal, must be shown by evidence on the part of the defence. *Charles v. National Guardian Assurance Company*, 29 Law Tim. Rep. 246.

LIFE INSURANCE [vol. 3, pp. 41, 123].—*Statement of interest in policy*—14 Geo. 3, c. 48, s. 2 [vol. 1, p. 274].—The object of the 14 Geo. 3, c. 48, was to prevent wagering policies, and the 2nd section provides "that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons' name or names interested therein, or for whose use, benefit, or on whose account, such policy was so made or underwrote." It has been held, in the following case in the Court of Queen's Bench, that in a policy of life insurance the name of the party interested in the life must be inserted as being the party interested, and a declaration cannot be supported which states the interest to be in a different person from the person alleged in the policy. *Hodson v. The Observer Life Assurance Society*, 5 Week. Rep. 712.

MASTER AND SERVANT [vol. 3, p. 387].—*Negligence of servant keeping his own horse at the master's expense.*—A master who allows his servant to keep a horse and gig at his (the master's) expense

on the understanding that he is to use it in his master's service, is liable for injury occasioned to another person by the servant's negligent driving of the horse and gig while engaged upon his master's business. *Patten v. Rea*, 29 Law Tim. Rep. 161.

MASTER AND SERVANT.—*Authority to purchase goods on credit—Recognition of one act gives general authority.*—A single instance of a purchase by a servant of goods on credit recognised by the master is sufficient to raise an inference of general authority to purchase goods on credit. The defendant's shopman had, on various occasions, ordered goods on credit for the shop, and these orders had been ratified by the defendant; but on every occasion the goods had been ordered by the shopman at the shop, and had also been delivered there: Held, that this afforded evidence of authority in the shopman to purchase goods on credit from the shopman at another place, and to carry them away himself. *Summers v. Solomon*, 5 Week. Rep. 660.

MASTER AND SERVANT.—*Responsibility of master for act of servant in excess of command* [vol. 3, p. 387].—*Trespass, excess.*—A person who requests another, his servant in that behalf, to remove one making a disturbance in his house is not responsible for excess of force or violence in carrying out his command. *Semble*, that he may be answerable for negligent performance of his order. *Pidgeon v. Legge*, 5 Week. Rep. 649.

PATENT.—*Assignment* [vol. 3, p. 11].—*Entry thereof in register—Notice of objections* [vol. 1, p. 16].—The 15. & 16 Vic. c. 83, s. 35, provides that till the entry of the assignment has been made in the register of proprietors, the grantee of letters patent shall be deemed and taken to be the sole and exclusive proprietor thereof. In an action by the assignee of letters patent for an infringement, the declaration alleged that the patent was duly assigned to the plaintiff, and defendant traversed the averment as alleged: Held, that the averment included not only the execution of the indenture of assignment, but all that was necessary to give it operation, and that, therefore, under the traverse, the defendant might show that the indenture was not registered in the register of the proprietors in the Court of Chancery. *Semble*, that the notice of objections required under the 5 & 6 Will. 4, c. 83, and 15 & 16 Vic. c. 83, is confined to objections affecting the validity of the patent. In the notice of objections delivered was one, that the defendant intended to deny the several allegations in the declaration. *Semble*, that it was open to defendant under this notice to show that the assignment of the patent was not entered in the register of proprietors, and that, if the plaintiff wanted a more specific notice, he ought to have

applied for better particulars. *Chollet v. Hoffman*, 29 Law Tim. Rep. 158.

PATENT.—*Specification—Invention not new—Previous user* [vol. 3, p. 396].—Plaintiff obtained two patents for an invention for improvements in the manufacture of gas. In an action for infringement it was proved that an essay had been published previously, showing in effect the same thing, and also that another anterior patent had been obtained in substance to the same effect: Held, that the invention of the plaintiff was not new, and that it was for the court to construe the specification; also, that the claim of the second patent being merely for making gas direct from seed and matters stated in the specification, without reference to any mode of doing it, was too large and general a claim. *Booth v. Kennard*, 29 Law Tim. Rep. 163.

PUBLIC COMPANY.—*Action for calls—7 & 8 Vic. c. 110, ss. 27, 29*—[set out vol. 1, p. 301].—*Transfer of shares by director of joint-stock company—Acceptance of by company—Sale of business of company.*—The 27th sec. of the 7 & 8 Vic. c. 110, regulates the duties of directors in the affairs of their company, and enacts that they are not to sell any but forfeited shares for non-payment of calls. By sec. 20, no contract in which a director is interested, is to be of force until approved at a general meeting of the shareholders. When a director of a joint-stock company agreed to transfer his shares in the company to the secretary for the benefit of the company, and such shares were transferred and accepted by the company: Held, that such agreement was not in contravention of 7 & 8 Vic. c. 110, ss. 27, 29: Held, also, that a sale of the company's business does not preclude it from suing for calls made before such sale. *Plate Glass Universal Insurance Company v. Lumley*, 5 Week. Rep. 727.

PUBLIC COMPANY.—*Joint-stock company—Power to draw and accept bills—7 & 8 Vic. c. 110, s. 45—Construction of deed of settlement.*—Where directors of a joint-stock company are authorised by its deed of settlement to draw or accept bills of exchange, a proviso in the deed that such bills shall be so made or accepted, &c., as to be binding on the company and on the shareholders, to the extent of the respective shares held by them in the capital stock of the company and no further, is repugnant and void, and the bills drawn or accepted by the directors in conformity with the provisions of the Joint-Stock Companies Act, 7 & 8 Vic. c. 110, s. 45, bind the company, and in an action by the payee (it not being proved that he had actual notice of the provision in the deed), it was held that he was entitled to recover. *Gordon v. Sea Fire and Life Assurance Company*, 26 Law Journ. 202, Ex.

PUBLIC COMPANY.—*Joint-stock company—Action for calls—Extinction of liability by transfer of shares to company—Sale of business after call made—7 & 8 Vic. c. 110, ss. 27 and 29.*—An agreement between the directors and a retiring shareholder that he should retire and transfer his shares for the benefit of the company, and an acceptance of such transfer by the company, constitute a defence to an action against the shareholder for calls subsequent thereto. But the sale of the business to another company, with all the rights and liabilities of the concern, is not a discharge of the liability of a shareholder to a call previously made, although the subject-matter for which such call was made passed to the other company as incidental to the sale. *The Plate Glass Universal Insurance Company v. Lumley*, 29 Law Tim. Rep. 277.

RAILWAY AND CANAL TRAFFIC ACT [vol. 3, pp. 304, 323, 401].—*What undue preference or prejudice—Cost of carrying less than for others—Demurrage—Injunction.*—A railway company is justified in carrying goods for one person at a less rate than that at which they carry the same description of goods for another, if there be circumstances which renders the cost to the company of carrying for the former less than the cost of carrying for the latter. The North-Eastern Railway Company, from a desire to introduce the northern coke into Staffordshire, were induced to make special agreements with different merchants for the carrying of coal and coke at a rate lower than the ordinary charge: Held, that this was not a legitimate ground for making such agreements, and that lowering their rates for that purpose, there being nothing to show that the pecuniary interests of the company were affected, was giving an undue preference to that traffic. The court refused to require the company to provide trucks for the carriage of coal and coke for a merchant who refused to pay demurrage therefore at the same rate as was charged to all other merchants under similar circumstances. *Oxlade v. North Eastern Railway Company*, 26 Law Journ. 129, C. P.

RAILWAY AND CANAL TRAFFIC [vol. 3, pp. 130, 186, 304, 323, 401].—*Regulation Act (17 & 18 Vic. c. 31).*—*Admission of hackney carriages into station of railway company.*—A railway company under an arrangement which they made with one proprietor of hackney carriages, gave him the privilege of bringing his cabs into their station for the purpose of plying for hire among the passengers arriving by the trains to the exclusion of other cab proprietors. It not being shown that the arrangement was not advantageous to the public, as well as to the railway company, the court refused a rule, on the application of a hackney-carriage pro-

prietor, who was excluded from plying for hire in the station, calling on the company to show cause why a writ of injunction should not issue to admit his carriages, or a writ to exclude the carriages of the proprietor with whom the company had made the above arrangement. *Ex parte Beadell*, 6 Week. Rep. 650.

SHIPPING.—*Merchant Shipping Act* [vol. 3, pp. 94, 125, §23]—*Rule for ships meeting each other*—*Rule for steamers in narrow channels*—*Meaning of "fairway or midchannel"*—The 14 & 15 Vic. c. 79, s. 27, provides "that where one vessel meets another, and the master of either perceives that if both continue their respective courses they will risk a collision, he shall put the helm of his vessel to port, so as to pass on the port side of the other vessel. And the master of any steam-vessel navigating any narrow channel shall keep as far as it is practicable on that side of the fairway or midchannel thereof, which lies to the starboard side of such vessel." A barge was proceeding up the River Thames in mid-stream; a steamer was going down the river well over on the south shore: as they approached, the barge put her helm to port, which brought her over to the south side, and a collision took place. The judge who tried the cause directed the jury, that, according to the construction of the act, the steamer ought to keep on the right side of, but within, the fairway; and he left them to say whether she was in the fairway, and from whose negligence the accident arose; and the jury found for the plaintiff: Held, that the direction of the judge was right; that "the fairway or midchannel" meant the whole navigable part of the river; and, further, that the finding of the jury was wrong upon the evidence, although the court could not interfere to grant a new trial on that ground, as the damages awarded were under £20. *Smith v. Voss*, 29 Law Tim. Rep. 97.

SHIPPING.—*Insurance—Voyage policy—Implied warranty of sea-worthiness—Meaning of sea-worthiness.*—A warranty of sea-worthiness in voyage policies is the basis of the contract. Sea-worthy means that the ship is in a condition in all respects to render it reasonably safe where it happens to be at the time referred to. *Knyll v. Hooper*. 29 Law Tim. Rep. 229.

SHIPPING.—*Stranded ship—General average* [vol. 3, p. 304]—*Liability of goods and freight to contribution.*—Usually, when there is a general average, the ship, freight, and goods, and all contribute to it; but if there were no goods on board, and by a voluntary sacrifice ship and freight are saved a common peril, the freight ought rateably to contribute to the loss; and where there are separate insurances on ship and freight, the calculation must be made as to the amount of the contribution by

each, although the whole of the freight which was in peril is to be received by the owner of the ship, and, without insurance, the whole of the loss would fall on him. It has been decided in the following case that the expenses incurred in getting off a stranded ship, and getting her into port, are general average when incurred for the common benefit, to which the freight and cargo are bound to contribute, even when the cargo has been landed, but remains in the custody of the master, and is only unloaded in the course of getting off the vessel, but not with the intention of putting an end to the adventure. *Morgan v. Jones*, 5 Week. Rep. 502.

SHIPPING [vol. 2, pp. 21, 91].—*Negligence—Collision—Contribution—Merchant Shipping Act* [vol. 2, pp. 54, 121].—The 296th section of the Merchant Shipping Act, which provides a rule for the conduct of ships meeting each other; and the 298th, which says that if a collision ensues from breach of such rule the owner shall not be entitled to recover, do not absolutely bar an owner from recovering in case his vessel is damaged when not acting in obedience to such rule; but, in such case, the rule as to negligence is the same as before the statute, and as in ordinary cases of negligence. Where the judge had left it to the jury to say whether the plaintiff had directly contributed to the result: Held, no misdirection, and that he ought not to add "or indirectly." *Tuff v. Wairman*, 29 Law Tim. Rep. 199; 5 Week. Rep. 685.

SHIPPING.—*Seaman—Right to recover on new contract for extra remuneration for perilous services.*—It is a well established rule of law (*Harris v. Carter*, 3 Ell. and Blackb. 559) that a seaman is bound to exert himself to the utmost upon any emergency to bring the ship out of a situation of peril without any additional remuneration for his services; but there is a broad distinction between that case, and the one where the ship being in a place of safety, the question is whether the seaman is bound to continue the voyage in her at every risk. In such a case the seamen are not bound to go on at the hazard of their lives. A seaman under articles to serve for a voyage may recover upon a promissory note given to him by the captain to secure the payment of extra-remuneration in consideration of his assisting to take the ship on with a crew so much diminished by desertion that it was dangerous to life to proceed with so few hands. *Hartley v. Ponsonby*, 5 Week. Rep. 659; 29 Law Tim. Rep. 195.

STATUTE OF LIMITATIONS [vol. 3, pp. 89, 91].—*Acknowledgment of debt—What sufficient* [vol. 3, pp. 89, 91, 157, 305].—In the following case Mr. B. Bramwell stated that the law as to debts being taken out of the operation of the Statute of Limitations is not in a satisfactory condition. Soon after

the statute was passed which provided that no action should be brought to recover a debt unless commenced within six years after the cause of action, it was discovered that in many cases it operated unjustly, from the cause of action being treated as accruing when the original promise was made, or the obligation originally arose; and the courts made an innovation upon the original simplicity of the statute of James, by holding that the cause of action accrued at the time when a renewed promise was made. That step being once made, it cleared the way for others, until any evidence of a promise or even an acknowledgment accompanied by a refusal to pay, was held sufficient to take the case out of the statute. If the object of the statute had been considered, these innovations would never have been made. This was set right by the case of *Tanner v. Smart* (6 B. and C. 608), in which the doctrine that the statute was founded on the presumption of payment, and that whatever repelled that presumption was an answer to the statute, was exploded; and the rule was laid down that an acknowledgment is an answer to the statute only when "it is evidence of a new promise, and supports and establishes the promises which the declaration states. Upon this principle, whenever the acknowledgment supports any of the promises in the declaration, the plaintiff succeeds; when it does not support them, though it may show clearly that the debt never has been paid, but is still a subsisting debt, the plaintiff fails." There was this technical difficulty with reference to the action of debt, that where a promise was relied upon to defeat the statute, evidence of that promise did not, strictly speaking, support the declaration. It is highly probable that Lord Tenterden's Act was framed with a view to meet this difficulty; for it enacts that in "actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby, &c., unless such acknowledgment or promise shall be made," &c. It is not unreasonable to infer that it was intended that a simple acknowledgment should take a debt out of the statute. As said by Mr. Baron Parke, in *Smith v. Thorne* (21 L. J. Q. B. 199), "in order to maintain the issue, there must be proof of (*sic*) Lord Tenterden's Act; that proof must be in writing, a promise conformable to the allegation; and since there must be an acknowledgment from which the court can infer a promise to pay on request, or a promise to pay on condition, which condition has been fulfilled, or a promise to pay after a time, which time has elapsed, I quite agree that if there be merely an acknowledgment of the debt without any accompanying observations, as if there had been an "I O U £275," that would

have been sufficient to support the issue, because from the absolute acknowledgment of a debt, unaccompanied by any qualifying observations, you may infer a promise to pay on request." What the court has to do in each particular case is to look at the documents with a view to discover whether any promise has been made within six years. If the debtor has within that period acknowledged the debt, and accompanied such acknowledgment by expressions amounting to a refusal ever to pay it, it is clear the statute operates. But where the acknowledgment is accompanied merely by the expression of a hope that he may be able to pay it, as where the debtor says, "I owe you £100, which I hope to pay in a month," Mr. B. Bramwell thinks that the cases in which it has been held that such an expression of a hope has negated the inference, which otherwise would have been drawn, of a promise to pay, have been wrongly decided. The following letter was relied upon to take a debt out of the Statute of Limitations:—"I have received your bill. It does not, I think, specify sufficiently to which cottages the work is done; for instance, you say 52 feet feather board, 9s. 6d., &c. I do not know where all this is done. I shall feel obliged if you will more particularly explain, and take your agreements to Mrs. H. It is my wish to settle your account immediately; but being at a distance, I wish everything very explicit and correct. I have asked Mrs. H. to mark the agreements, and send them to me, and I will return them by the first post, with instructions to pay if correct." Held, that there was a sufficient acknowledgment of the debt; that there was nothing in the letter to qualify such acknowledgment, so as to negative the inference to pay on request, nor any condition appended thereto, and that the debt was therefore taken out of the statute. *Sidwell v. Mason*, 5 Week. Rep. 729; 29 Law Tim. Rep. 213.

SURETY.—*Promissory note—Equitable plea* [vol. 3, pp. 301, 324, 345]—*Surety—Discharge—Giving time to principal* [vol. 2, pp. 307, 344; vol. 3, pp. 202, 262].—At law it seems to have been thought that the discharge of a surety, by giving time to the principal without the surety's consent, was founded on a variation of the contract between the creditor and the surety; and if that be so, it necessarily follows (the rule of evidence as to not varying a written contract by parol being the same at law and in equity, 3 Law Chron. 335), that no parol contemporaneous agreement could be allowed to vary the contract in the case of a written instrument (*Ibid.*). In equity the doctrine of the discharge of the surety, by time given to the principal debtor, is not confined to cases where the relation of suretyship appears on the original contract between the creditor, the

principal, and the alleged surety; but an equity arises from the relation of the co-obligors or co-promisors *inter se*, and on the knowledge by the creditor of the existence of that relation. In the case of *Hollier v. Eyre* (9 Cl. and Fin. 1), Lord Cottenham, in delivering his opinion in the House of Lords, laid down the rule, that "the question whether the plaintiff, as between himself and the grantees, was a principal in the grant of the annuity, or only a surety for the payment of it by another, must be ascertained by the terms of the instruments themselves." "No extraneous evidence," said he, "is admissible for that purpose." It remains, however, to consider whether, assuming the contract, as between the creditor and the parties contracting with him, to be (as apparent on the face of the written document) a primary and not a collateral liability, an equity does not arise from the relationship of the principal, and surety *inter se* known to the creditor. In the above cited case of *Hollier v. Eyre*, Lord Cottenham said: "But although all the grantors were principals as between them and the grantees, yet as between themselves some of them might be sureties for others; and if it was established that such was the case as between the plaintiff and Lynch, and that the grantees knew that such was the case, they might, by their dealing with Lynch, have raised an equity in favour of the plaintiff entitling him to the protection of a court of equity against the legal consequences of the instruments he joined in executing. This distinction is perfectly well settled, and is the ground of many of the decisions." These principles were adopted and applied at common law in the following case:—*Action by payee against maker of a promissory-note, plea for defence on equitable grounds, that the note was made by defendant jointly with J. H., as the surety only of J. H., and was delivered to plaintiff, and accepted by him upon an express agreement that defendant should be liable thereon as surety only for J. H., and that plaintiff at the time the note was made had knowledge of the same having been so made by him as surety; and that plaintiff, without the consent of defendant, gave J. H. time for the payment of the note: Held, that defendant was entitled to judgment on the ground that the plea sufficiently stated that the relation of principal and surety existed between defendant and the principal debtor inter se, and that the plaintiff had knowledge of that fact when the note was made and received by him, and when he gave time to the principal debtor.* *Pooley v. Harradine*, 3 Jur. N. S. p. 488.

TROVER [vol. 3, pp. 188, 224, 281].—*Goods obtained by false pretence—Sale not in market overt, no title conferred* [vol. 3, p. 224].—A person who obtains the goods of another by a false pretence,

and having, therefore, no title to them, cannot confer a title on a *bonâ fide* purchaser except the sale be in market overt. A. falsely represented to B., the owner, that he was sent by C. to purchase goods for C., and by means of this fraud obtained possession of the goods. He took them to the defendant, an auctioneer, who sold them not in market overt: Held, in an action by B. against the auctioneer, that he was entitled to recover. *Higgins v. Burton*, 29 Law Tim. Rep. 165.

COMMON LAW PRACTICE.

ARBITRATION.—*Order of Nisi Prius.*—*Verbal assent of third party interested in subject-matter.*—If a third party interested in the subject-matter of a pending action verbally consents to become a party to an order of Nisi Prius, directing a reference upon certain terms, he is bound by that assent, though he should afterwards become acquainted with facts which make him wish to withdraw from it; and the Court of Queen's Bench will compel him to carry out the agreement unless they are satisfied that he has been in some way deceived or mistaken, or that it would be clearly inequitable to do so. *Williams v. Lewis*, 29 Law Tim. Rep. 195.

ARBITRATION.—*Arbitrator's charges excessive—Review of taxation.*—Where a cause has been referred to arbitration, and an award made, the court will review the taxation of the costs between party and party, if they think the charges made by the arbitrator, even though a barrister, are excessive. Per Pollock, C. B., unless arbitrators are reasonable in their charges, the evils of arbitration will be greater than those of litigation. *Webb v. Wyatt*, 3 Jur. N. S. p. 496.

ARBITRATION.—*Staying proceedings in action—Common Law Procedure Act, 1854 (17 & 18 Vic. c. 125, s. 11).*—*Reference agreed to by instrument in Writing—Fraud.*—Under the Common Law Procedure Act, 1854 (17 & 18 Vic. c. 125, s. 11), when parties to an instrument in writing agree to a reference, and an action is brought afterwards, the court has power to stay the proceedings. Where, after an agreement in writing to refer disputes on a contract, one of the parties brought an action, the court, in its discretion, refused to stay the proceedings under the 11th section of the Common Law Procedure Act, 1854, the plaintiff, *bonâ fide*, alleging that the question raised was one of fraud. *Wallis v. Hirsch*, 26 Law Journ. 72, C. P.

ARTICLED CLERK [ante, p. 36].—19 & 20 Vic. c. 71—*Affixing stamp to indenture of clerkship to an attorney—Admission of articulated clerk—Service under stamped articles.*—The court will admit an attorney and allow his service to date from the date of his articles, though they were not stamped during

the service, when it appears that there had been no intention to cause the service to be under unstamped articles, and that it was not the fault of the clerk himself. *Re Welch*, 5 Week. Rep. 505.

NORZ.—There was an affidavit by the attorney (the father of the articulated clerk), stating that he had intended to stamp the articles and have them enrolled, but that immediately after they were executed he fell into pecuniary difficulties, which he did not name to his son, and that the son had done the duties of the office. Lord Campbell distinctly stated that the late act was not intended to give a right to have the articles stamped at any time.

ATTORNEY.—*Taxation of costs—Professional skill—Remuneration for—Moving to review after accepting amount of allocatur.*—Under particular circumstances, and where clearly for the client's benefit, an attorney is entitled to be paid for the actual amount of labour and skill he has bestowed upon the subject, and not according to mere measurement. The Master having taxed a bill and reduced a particular item, the attorney intimated his intention of applying to the court for a rule to review, but at the same time required payment of the amount found due by the allocatur, which was accordingly paid: Held, that he could not afterwards apply for a rule to review the taxation. *Semble*, that where an attorney bestows great skill and labour upon the subject-matter of an item in his bill (such as analysing the depositions in a criminal prosecution against his client), the remuneration in respect of such item should be in accordance with the skill and labour bestowed, and not be regulated by mere measurement of the item itself. *Re Marshall, ex p. Wooler*, 29 Law Tim. Rep. 159.

ATTORNEY.—*Arrest—Privilege—Costs—Attorney of bail and not of party to cause.*—An attorney who attends a court of justice simply as the attorney of persons putting in bail in another cause, and who is not the attorney in the cause, is not privileged from arrest. A., who attended the Lord Mayor's Court as attorney for B. and C., to assist them in putting in bail for the purpose of dissolving an attachment in an action in that court, but who was not attorney in the cause, was arrested on leaving that court. He obtained a rule nisi for his discharge on the ground of privilege. The Court of Common Bench discharged the rule with costs. *Jones v. Marshall*, 5 Week. Rep. 623; 29 Law Tim. Rep. 161.

BILLS OF EXCHANGE ACT [vol. 2, pp. 58, 63, 65].—18 & 19 Vic. c. 67—*Amendment Common Law Procedure Acts.*—Where a writ, under the Bills of Exchange Act, 18 & 19 Vic. c. 67, had been improperly sued out, in a case to which the act did not apply: Held (Cockburn, C. J., *dubitante*), that the

court had power, under the 222nd section of the Common Law Procedure Act, 1852, to amend the writ, and to make it a good writ under the latter act. *Leigh v. Baker*, 3 Jur. N. S. 668.

DISCOVERY OF DOCUMENTS.—*Affidavit—Of what documents discovery may be had* [vol. 2, pp. 225, 263].—To entitle a party to a discovery of documents, their existence must be shown with reasonable certainty. The court refused a discovery of letters from the captain of a ship to his owners, in an action against the latter for breach of charter-party in the ship being out of repair. *Thompson v. Robson*, 5 Week. Rep. 728.

DISCOVERY [vol. 3, pp. 225, 263].—*Interrogatories—Ejectment.*—A plaintiff in ejectment has no right to call upon the party in possession (the defendant) to answer interrogatories stating by what title he is so in possession. *Horton v. Bott*, 29 Law Tim. Rep. 228.

EXECUTION.—*Fi. fa.—Sale of goods by debtor after writ lodged*—19 & 20 Vic. c. 97, s. 1 [see vol. 3, pp. 210, 212].—Section 1 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vic. c. 97), by which *bonâ fide* purchasers are protected against writs lodged at the time of the sale with the sheriff against the goods of the seller (see vol. 3, pp. 210, 212), does not apply to any case where the writ was lodged with the sheriff at the time the act was passed. *Williams v. Smith*, 5 Week. Rep. 729.

INTERPLEADER.—*Jus tertii—Effect of issue—What title the claimant must show.*—It is sufficient to entitle a claimant to maintain an interpleader issue to try whether goods seized by the sheriff are the goods of the execution creditor as against him to show that he obtained possession from the owner, a third party, and gave the execution debtor possession of them, although such third party still remains the real owner. *Green v. Stephens*, 5 Week. Rep. 497.

NEW TRIAL.—*Verdict under £20—Fraud.*—The rule that the court will not grant a rule for a new trial when the verdict is under £20, except in cases of misdirection, does not apply to cases in which the verdict has been obtained by fraud or perjury. In such cases there is no limit to its jurisdiction. *May v. Stevens*, 29 Law Tim. Rep. 202.

NEW TRIAL.—*Liberty to move—Whether evidence to support finding.*—Where the jury find the question submitted to them in favour of one party, and another fact which was not submitted to them in favour of the other, and the judge directs the verdict to be entered for the party in whose favour the jury found the question submitted to them, with liberty to the other to move, the court will consider whether there was evidence to warrant the finding. *Wood v. Leighton*, 29 Law Tim. Rep. 199.

PAYMENT INTO COURT.—*Detinue.*—To an action for detaining the plaintiff's goods, and claiming their return or their value, it is not competent for the defendant to pay money into court. *Allen v. Dunn*, 26 Law Journ. 185, Ex.

SEQUESTRATION.—*Priority of writs—Duty of bishops.*—When several writs of *levari facias* are delivered to a bishop, the writs of sequestration thereon are to be issued by him in the order of time in which the writs of *levari* were delivered to him to be executed, and not according to priority of date. *Sturgis v. The Bishop of London*, 29 Law Tim. Rep. 87.

STAYING PROCEEDINGS.—*Suit in equity and action at law for the same subject-matter.*—Plaintiff and defendant had been partners. Plaintiff had filed a bill in Chancery for an account, and a certain bill of exchange was one of the matters in question; he also commenced an action at law on the same bill of exchange: Held, that he might do so, and this court refused to stay proceedings. *Pearse v. Robins*, 29 Law Tim. Rep. 97.

BANKRUPTCY.

ACT OF BANKRUPTCY.—*Assignment to a creditor by a trader of the bulk of his property.*—The reader will better understand the bearing of the following decision by referring to 3 Law Chron. p. 33, and the references there. If the sale by a trader of the bulk of his property is *bonâ fide*, and neither on the part of the buyer nor of the trader is there any intention to work a fraud, and there is no fraudulent preference, and no fraudulent sale, this is not an act of bankruptcy. These are questions of fact for a jury. *Bell v. Simpson*, 29 Law Tim. Rep. 202; 5 Week. Rep. 688.

ACT OF BANKRUPTCY—FRAUDULENT PREFERENCE [vol. 3, pp. 161, 392].—*Bill of sale founded on previous verbal promise—Immediate benefit for giving the security.*—A bill of sale, founded upon a verbal promise to give security in respect of a guarantee for the bankrupt's benefit made three years previously, and executed voluntarily by the bankrupt upon the occasion of a subsequent additional guarantee, is not an act of bankruptcy, nor a fraudulent preference within the meaning of the Bankruptcy Consolidation Act, although the bankrupt was at the time confessedly in insolvent circumstances. The principle upon which the court proceeds in determining such a question is, whether or not the bankrupt has received an immediate benefit as a consideration for the bill of sale. *Re Kindred*, 29 Law Tim. Rep. 250.

CERTIFICATE.—*Refusal of certificate—Application to rehear—Jurisdiction.*—The bankrupt's certificate having been refused altogether in 1844, the

commissioner has no jurisdiction, under sec. 12 of the Bankrupt Act, 1849, to rehear the case except under sec. 207; and there being no evidence before the court of the certificate having been refused by reason of false or improper suppression of evidence, or fraudulently, as required by sec. 207, an application to rehear was refused. *Re Westrup*, 29 Law Tim. Rep. 99.

EXCEPTED ARTICLES [vol. 1, p. 158].—17 & 18 Vic. c. 119, s. 25—*Builder—Scaffold poles not within the section.*—Scaffold poles used by a builder in his trade are not "tools, implements, and other like necessities," within the meaning of the 17 & 18 Vic. c. 119, relating to excepted articles to be retained by a bankrupt. *Re Davis*, 29 Law Tim. Rep. 99.

INSPECTION OF PROCEEDINGS.—*Bankrupt's right to inspection of proceedings before surrender.*—A bankrupt who has not disputed the validity of the adjudication against himself within the time allowed by section 233 of the Bankruptcy Act, 1849, and has been outlawed for not surrendering, will not be allowed to inspect and have copies of the proceedings under section 232. The bringing an action of trespass by the bankrupt in New Zealand, where he resided, against the party who took possession of his property there under a power of attorney for the assignees in England, and following it up by an appeal from the decision of the Supreme Court in that colony to the Queen in Council, is not such an action, suit, or proceeding to dispute or annul the adjudication as is contemplated by section 232. *Re Bunney*, 29 Law Tim. Rep. 234.

PROOF.—*Bill of exchange—Part payment—Proof for residue.*—Where the acceptor of a bill becomes bankrupt, and the drawers pay a portion of the amount of the bill to the holder of it, the latter can prove only for the amount remaining due. Indeed, it does not follow that because there is a right to recover at law, there is a right of proof in bankruptcy. The obligee of a voluntary bond can recover on it at law, but he cannot prove in bankruptcy. So also a mortgagee of a bankrupt's estate can recover on his covenant at law, but can only prove for the deficiency in bankruptcy. And it has been decided by the Lords Justices in the following case that the holder of a bill of exchange having, before the proof, received part payment from the drawer, can only prove against the bankrupt acceptor for the residue which is due at the time when proof was made. *Re Houghton*, 5 Week. Rep. 669.

SURRENDER [vol. 2, p. 176].—*Neglect in due time—Leave to surrender after time for doing so expired—Reasons for.*—Where a bankrupt is in contempt for not having surrendered to the adjudication within the time prescribed by the Bankruptcy Act,

1849, the court will, in exercise of its jurisdiction under section 12, permit him to surrender, provided the assignees do not object thereto, or threaten criminal proceedings. *Re Bunny*, 26 Law Tim. Rep. 231.

COUNTY COURTS.

HIGH BAILIFF.—*Practising as attorney—Application under Absconding Debtors Act.*—An application to a county court judge, under 14 & 15 Vic. c. 52, s. 1, for a warrant to arrest an absconding debtor, is not a proceeding in the county court within the meaning of 9 & 10 Vic. c. 95, s. 29, which imposes a penalty upon the high bailiff of any county court for practising as attorney or agent for any party in any proceeding in that court. *Warden v. Stone*, 29 Law Tim. Rep. 90.

PROHIBITION [vol. 3, p. 75].—*Jurisdiction—Action for malicious prosecution—Prohibition where want of jurisdiction* [vol. 1, pp. 17, 94, 357].—If the superior court sees that a plaintiff is in substance for a matter over which the county court has not jurisdiction, it will issue a prohibition. Where, therefore, a plaintiff claimed by his plaintiff costs and expenses, which if recoverable at all against the defendants, could only be recovered as damages in an action for a malicious prosecution: Held, that it was a proper case for a prohibition. *Hunt v. The North Staffordshire Railway Company*, 5 Week. Rep. 781; 29 Law Tim. Rep. 214.

CRIMINAL LAW.

BASTARDY ORDER [ante, p. 31].—*Amendment of informality—Service of summons—Place of abode*—12 & 13 Vic. c. 45, s. 7.—An affiliation order described the mother of the bastard as residing at A., which was in fact, but was not in the order described as being, in the petty sessional division for which the justices were acting. The summons, however, on which the order was made, and which the court held under the circumstances to have been duly served, described A. as in the petty sessional division in question, and the summons was put in evidence and read before the justices: Held, that it was sufficiently in proof before the justices that the mother resided in the petty sessional division to authorise the court to amend the order in that respect under the 12 & 13 Vic. c. 45, s. 7. *Reg. v. Hegham*, 5 Week. Rep. 507.

EXPOSING CHILD [vol. 1, p. 455].—*Felony—Causing bodily injury dangerous to life—Attempt to murder*—7 Will. 4, and 1 Vic. c. 85, s. 2.—The 7 Will. 4, and 1 Vic. c. 85, s. 2, enacts that "whoever shall administer to, or cause to be taken by any person, any poison or other destructive thing, or shall stab, cut, or wound any person, or shall by any

means whatsoever cause to any person any bodily injury dangerous to life, with intent in any of the cases aforesaid to commit murder, shall be guilty of felony, and being convicted thereof shall suffer death." In the following case, it appeared that the prisoner, intending to cause the death of her child, left it on a cold wet day in a field. It was found nearly dead from congestion of the lungs and heart, which would have been in a short time fatal, but it was restored, and no bodily injury to it ensued either from the congestion or otherwise: Held, that as there was no lesion of the organs of the child, a conviction under the above provision of the 7 Will. 4, and 1 Vic. c. 85, s. 2, for causing "a bodily injury dangerous to life," could not be supported. *Reg. v. Gray*, 5 Week. Rep. 786.

FALSE PRETENCES.—*Valuable security within the 7 & 8 Geo. 4, c. 29, s. 58—Bill of exchange, obtaining acceptance of—Property in instrument.*—Upon an indictment under the 7 & 8 Geo. 4, c. 29, s. 55, for obtaining a valuable security by false pretences, it was proved that the prisoner, having by false pretences induced the prosecutor to agree to purchase some leather, produced a bill duly stamped, signed by himself as drawer, and made payable to his own order, and induced the prosecutor to accept and deliver it to him for the price of the leather. The prisoner subsequently indorsed and negotiated the bill, and appropriated the proceeds: Held, that he had committed no offence within the statute, as, in order to support a conviction, the valuable security must be the property of some one other than the prisoner, and must be a valuable security whilst in the hands of the prosecutor; whereas this was of no value to any one at that time unless to the prisoner. *Reg. v. Danger*, 5 Week. Rep. 738.

FORGERY.—*Uttering accountable receipts for goods—Pawnbroker's duplicate.*—A pawnbroker's duplicate given in the form prescribed by the stat. 39 & 40 Geo. 3, c. 99, is an accountable receipt for goods within the statute relating to forgery; and a pawnbroker who upon being summoned before magistrates for not returning certain property which had been pledged with him upon the repayment of the money advanced, with interest, delivered by the hands of his attorney a forged duplicate to the magistrates, as the genuine duplicate which he had given when the goods were pledged, and which he had received back when the money was repaid, was held, properly convicted of uttering. *Reg. v. Fitchie*, 26 Law Journ. 90, M. C.

HOMICIDE BY FOREIGNER.—*High seas—Jurisdiction*—9 Geo. 4, c. 31, s. 8.—By the 8th sec. of 9 Geo. 4, c. 31, s. 8, it is enacted, that "where any person, being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of

England, shall die of such stroke, poisoning, or hurt in England, or, being feloniously stricken, poisoned, or otherwise hurt at any place in England, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of England, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before the act to murder, or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county or place in England in which such death, stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been wholly committed in that county or place." An injury was inflicted by the prisoner, a foreigner, upon G., also a foreigner, on board a foreign vessel on the high seas. G. afterwards died in this country from the effects of the injury: Held, that the prisoner could not be tried for the offence in this country. *Reg. v. Lewis*, 3 Jur. N. S. 523; 26 Law Journ. 104, M. C.

JUSTICES.—*Hearing by*—*What amounts to an adjudication*—*Mandamus to hear*—*Complaint against owner of mine*.—A mandamus to justices to hear and determine a complaint will lie where they have declined to exercise jurisdiction, but not where they have adjudicated on the matter. On the hearing of a complaint before justices against one of the owners of a mine, under the 18 & 19 Vic. c. 108, s. 4 (an act to amend the law for the inspection of coal mines in Great Britain), for not providing a steam boiler with a proper steam-gauge, water-gauge, and safety-valve, it was objected, after the evidence had been taken in support of the complaint, that the information ought to have been laid against all the owners of the mine, and not against one only. The justices thinking the objection a good one, dismissed the complaint: Held, that the objection was untenable, and being in the nature of a plea of abatement and preliminary, the case was one in which the justices had not adjudicated, but had declined jurisdiction, and that, therefore, the Court of Queen's Bench would grant a mandamus to the justices to hear and determine the complaint. *Reg. v. Brown*, 29 Law Tim. Rep. 160; 5 Week. Rep. 625.

JUSTICE OF THE PEACE.—*Power to remand to prison*—*Liability to action for corruption in his office*—*Stat. 11 & 12 Vic. c. 43, s. 16*.—The 11 & 12 Vic. c. 43, s. 16, enacts that before, or during the hearing of any complaint or information, a justice may at his discretion adjourn the hearing to a time and place to be appointed and stated, and in the meantime may suffer the defendant to go at large, or to commit him to, amongst other places, the House of Correction, or to discharge him on entering into a recognisance to appear. It has been decided

that a justice of the peace has power, under the above provision of the statute, to commit to the House of Correction during a period of remand, in a case where he could not issue a warrant, but a summons only. A declaration stated that the defendant, a justice of the peace, convicted the plaintiff wrongfully, wilfully, and maliciously, and without reasonable or probable cause, and that the plaintiff was thereby compelled to pay a sum of money, and that the conviction was afterwards quashed on appeal to the quarter sessions: Held, that it disclosed a cause of action. *Gelen v. Hall*, 5 Week. Rep. 757.

LARCENY OR FALSE PRETENCES [vol. 3, pp. 23, 38, 289, 290].—*Obtaining by fraud, a watch sent through the post-office*.—A postmaster has no property in letters or their contents, although directed to be left in his office until called for by the party to whom the letter is directed. A., having bought a watch in London, returned it to the seller to be regulated. B. fraudulently wrote in the name of A. to the seller requesting him to send it in a letter to the post-office at C., and on its arrival at C., personated A., and received the watch: Held, that B. was guilty of larceny, as the postmaster was the mere servant of the true owner; and if the seller had any special property in the watch, it ceased when he sent it through the post. *Reg. v. Thay*, 29 Law Tim. Rep. 168; 3 Jur. N. S. 546.

LUNATIC PAUPER [vol. 3, pp. 231, 328, 329, 382].—*Irremovability*—*Expenses since September 1853*—*Order made before 16 & 17 Vic. c. 97*—*Parish of settlement and parish of residence*—*16 & 17 Vic. c. 97, s. 102*.—By stat. 16 & 17 Vic. c. 97, s. 102, from September, 1853, all the expenses of the removal and maintenance of a pauper lunatic who was irremovable when sent to an asylum, shall be borne by the parish of residence, if not in any union. A pauper lunatic was sent to an asylum from M., and in September, 1851, an order for maintenance was made on J., the parish of settlement, under stat. 8 & 9 Vic. c. 127, s. 62. This order had been obeyed down to September, 1853, but further payment thereunder to the treasurer of the asylum had been refused on the suggestion by J. that the pauper at the time of being sent away was irremovable from M. by reason of five years' residence there, and that from September, 1853, the costs of maintenance was by stat. 16 & 17 Vic. c. 97, s. 102, cast upon M., which was not in any union. The treasurer of the lunatic asylum obtained a distress warrant against the overseers of J. for the recovery of arrears due for the maintenance of the pauper, under which the plaintiff's goods were seized. In an action against the justices who granted the warrant: Held, that the order of maintenance was not annulled by sect. 102 of stat. 16 & 17 Vic. c. 97,

and the liability of T. continued until by proceedings between J. and M. the fact of irremovability had been found against M., either by admission or judicial decision; and therefore the justices had jurisdiction to grant the warrant. *Knowles v. Leigh*, 3 Jur. N. S. p. 383.

MANSLAUGHTER. [vol. 2, p. 216].—*Omission of duty—Commission, act of, not essential to constitute manslaughter—Death caused by negligence to put a stage over the mouth of a shaft—Murder and manslaughter distinguished—Culpable negligence.*—Where death is the direct consequence of the malicious omission of the performance of a duty, this is a case of murder. If the omission is not malicious, and arises from negligence only, this is a case of manslaughter. There is no authority for the position stated in some text books that without an act of commission there can be no manslaughter. It was the duty of the prisoner, who was bankaman at the mouth of the shaft of a colliery, to superintend the placing of a movable stage over the mouth of the shaft. Materials were sent down the shaft in crickets, and these were carried by trucks upon a tram-road on to the stage, which was removed when the buckets were attached. The prisoner negligently omitted to place the stage over the mouth, and by reason of the absence of it a bucket and truck fell down the shaft and killed the deceased, who was employed in walling the inside of the shaft: Held, that the prisoner was guilty of manslaughter. *Reg. v. Hughes*, 5 Week. Rep. 732.

MASTER AND SERVANT [ante, p. 33].—*Habeas corpus—Commitment under the Master and Servant's Act—Second commitment for a continuing absence from service—Form of warrant.*—This is the decision of the Court of Queen's Bench referred to ante, p. 33, as having been before noticed, but which we now find was not the case. The commitment of a servant to prison under 4 Geo. 4; c. 34, for absenting himself from his service does not dissolve the contract; and if, upon the expiration of his imprisonment, he does not return to his master's service, but upon request refuses to do so, his continuing absence is a fresh offence for which he may be again committed to prison. A warrant of commitment stated an adjudication as "well upon examination of J. M. upon oath in the presence of the accused as otherwise," that the accused "did misconduct himself in his said service by neglecting and absenting himself from his said service:" Held, that it sufficiently appeared that the accused had entered the service; that the words "as otherwise" did not import that any evidence had been taken in the absence of the accused or in any illegal manner; and that the warrant did not allege two offences.

Exp. Baker, 29 Law Tim. Rep. 159; 5 Week. Rep. 623.

PARLIAMENTARY ELECTIONS [vol. 2, p. 375].—*Election auditor—Appointment when to be made.*—An appointment of an election auditor for a county, in May, by the High-sheriff, who came into office in the preceding March, is valid, and supersedes the appointment made by his predecessor in a former year: section 15 of 17 & 18 Vic. c. 102, which provides for an appointment in the month of August, being directory in that respect. *Reg. v. Griffiths*, 29 Law Tim. Rep. 196.

PAUPER [vol. 3, p. 291].—*Order of removal—Construction—Residence.*—An order of removal of a pauper described her as the "wife of J. C., who is now absent from her, and not residing with her in the same township:" Held, that it sufficiently appeared on the face of the order that J. C. was not residing in the township in question, and that the court could not look at affidavits as to this not being the case. *Reg. v. The Inhabitants of the Township of Leeds*, 29 Law Tim. Rep. 499.

POOR.—*Action by guardians of one poor-law union against another for relief administered to non-resident poor—Orders of the Poor-Law Board.*—An action cannot be maintained by the guardians of the poor of a union, against the guardians of another union, in respect of relief afforded to the non-resident poor of the latter union, unless the accounts of such relief have been transmitted quarterly, in conformity with the orders of the Poor Law Board, notwithstanding that the relief was duly ordered, and never countermanded. *Quære*, whether an action could be maintained against the guardians, even if the account had been duly transmitted. *The Guardians, &c., of Wycombe Union v. The Guardians of Eton Union*, 26 Law Journ. 97, M. C.

PUBLIC HEALTH ACT [vol. 3, Index, tit.].—*Local board—Rating—Appeal—Prohibition—Sum adjudged, limit of for appeal purposes.*—The local board of health for the borough of Maidenhead had made rates for the purpose of carrying out the intentions of the Public Health Act, and A. had been included in the rates for property, the greater part of which, it was asserted, was out of the jurisdiction; one he had paid, but three others remained unpaid; he did not appeal, and, after the time for appealing had expired, the board caused a summons to be issued under the 103rd section of the act, and on the hearing an order was made for payment of the rates, or, in default, that a warrant of distress should issue; and against this order A. appealed to the quarter sessions under the 135th section of the Act, and the order was quashed with costs as against the local board, and the Court of Exchequer refused to grant a writ of prohibition to

the quarter sessions to restrain them from proceeding. The 135th section only allows an appeal when the sum adjudged exceeds 20s.; the three rates together amounted to more, but one was for 13s. 6d. only: Held, that the sum adjudged is the sum in respect of which the adjudication is made, and therefore that in the present case the sum adjudged exceeded 20s. *Ricards v. Maidenhead Local Board of Health*, 29 Law Tim. Rep. 165; 5 Week. Rep. 691.

SESSIONS.—*Hearing appeal—Confirming order subject to a case—Application at a subsequent sessions for costs.*—The 115th section of the 16 & 17 Vic. c. 97, enacts, "that upon any appeal the court before whom the same is brought may order the party against which the same is decided to pay to the other such costs and charges as may to such court appear just and reasonable." Therefore, if put only upon this act of Parliament, the power to give costs would appear to be confined to the same sessions as decide the appeal. Where the sessions decide an appeal, though subject to a case, the subsequent sessions have no jurisdiction to add to or vary the former decision, as by granting costs. The appellants appealed at the Midsummer Sessions, 1856, against an order adjudicating the settlement of a lunatic pauper. At the trial the sessions confirmed the order, subject to a case. The appellants having failed to proceed with the case in due time, and having given notice of abandonment, the respondents (after giving notice of their intention) applied to the Epiphany Sessions in 1857, for the costs of the appeal; which were accordingly ordered: Held, that the only sessions that had the power to give the costs were the sessions at Midsummer, at which the appeal was heard; and that the order for costs was accordingly bad. *Reg. v. Justices of Staffordshire*, 29 Law Tim. Rep. 196.

SEWERS RATE.—*Principle of rating—Appeal to commissioners of sewers*—11 & 12 Vic. c. 112, ss. 76, 96.—The general principle of rateability to sewers rates, that rateability depends upon benefit derived, has not been altered by s. 76 of the Metropolitan Sewers Act, 11 & 12 Vic. c. 112; but under s. 96 of the same statute, if a person has neglected to appeal to the commissioners against a rate within a month after it has been made, he is precluded afterwards from raising any objection to it. *The Metropolitan Board of Works v. The Vauxhall Bridge Company*, 5 Week. Rep. 711; 29 Law Tim. Rep. 211.

TRUCK ACT.—1 & 2 Wm. 4, c. 3 [stated vol. 3, p. 339]—*Contractor—Artificer not bound to labour personally—Wages—Profits on contract* [see vol. 3, pp. 52, 330].—The following is an affirmation by the Exchequer Chamber of the decision of the majority of the judges of the Court of Queen's Bench (stated

vol. 3, p. 330). The plaintiff, who was a labouring man unable to write, entered into a written contract with the defendant, a contractor, for making a line of railway, by which he engaged to make as many bricks as the defendant required him to make, to take the clay in its present state, and find all labour required in turning the clay and mixing it with ashes, &c.; to mould, set, and burn the bricks, and to stack them when burnt, finding all labour for drying the bricks, the defendant to find all materials; but all labour of every description to be found by the plaintiff for the sum of 10s. 6d. per thousand for the bricks when finished; the plaintiff to proceed with the work as fast as possible, and as directed by the defendant, and to his satisfaction. The plaintiff in fact did part of the work himself under the contract: Held (affirming the judgment of the majority of the Court of Queen's Bench), that the case did not come within the Truck Act, 1 & 2 Wm. 4, c. 37, as the plaintiff was not bound by the terms of the contract to do the work personally. *Ingram v. Barnes*, 5 Week. Rep. 726.

TURNPIKE.—*Exemption from toll—Travelling thereon 100 yards.*—The 3 Geo. 4, c. 126, s. 32, which exempts from payment of toll a person who merely crosses a turnpike road or travels thereon not more than 100 yards, applies to 100 yards of the same road on which the toll gate is situate; and is not enough to disentitle a person to the exemption that he travels more than 100 yards on another neighbouring road under the same trust. *Reg. v. Gerard*, 29 Law Tim. Rep. 87.

WINDING-UP JOINT-STOCK COMPANIES.

FROM a very useful report of the "Society for Promoting the Amendment of the Law," we extract the following information as to the winding-up of joint-stock companies, and which will, we doubt not, be acceptable to many of our readers:—

All joint-stock companies registered under the Joint-Stock Companies Act, 1856, including companies registered under 7 & 8 Vic. c. 110, which have obtained registration under the former act, must now be wound-up under its provisions—if with unlimited liability, in the Court of Chancery; if with limited liability, in the Court of Bankruptcy. Other companies, including banking and insurance companies, must be wound-up under the 7 & 8 Vic. c. 111, by the Court of Bankruptcy; or under the 11 & 12 Vic. c. 45, and the 12 & 13 Vic. c. 108, by the Court of Chancery; or by both courts under the provisions of those three acts.

Your committee have to observe, on the operation of the different acts for the winding-up of joint-stock companies,

First, with reference to the interests of creditors.

In cases where the winding-up of a company is in the Court of Chancery, under the 11 & 12 Vic. c. 45, and 12 & 13 Vic. c. 108, the property becomes vested in the official manager, who is the nominee of the shareholders, though appointed by the court, and in whose appointment or proceeding the creditors have no voice, by which means the control of the estate which belongs to the creditors is taken away from them, and is virtually given to the debtors themselves. Power is conferred upon the official manager, with the leave of the master, to pay such debts as he pleases, in preference to others. The property of the company thus vested in the official manager is liable to be seized at the instance and for the exclusive benefit of creditors obtaining judgment against him or against the company, and the registering of judgments so obtained entitles the creditor to preference by affecting the title to real and leasehold estates of the company. There is no power to defeat fraudulent preferences, or other unfair dealings with the property of the debtors. There is no right of inquiry, on the part of creditors, as to the conduct of their debtors, nor any punishment for commercial offences. Lastly, there is no protection given to shareholders, and protection even to the directors required to prepare the balance-sheet is limited to their coming to surrender. In fact, the winding-up of an insolvent company under these acts is a *quasi* bankruptcy, without the incidents of bankruptcy, which are essentially—administration by creditors, equality of distribution, defeating acts inconsistent with the due application of property, inquiry by creditors with attendant punishment, and temporary protection to debtors.

In cases where the winding-up is under the 7 & 8 Vic. c. 111, the powers of assignees for the purpose of satisfying the debts of the company, are limited to the administration of the assets of the company; and the Court of Bankruptcy has no power to enforce contributions from the members of the company for any deficiency, or to adjust their rights *inter se*, but the assignees are compelled to have recourse to the Court of Chancery for an order to effect those objects in that court. When such order is obtained in pursuance of 11 & 12 Vic. c. 45, s. 6, the creditors have no voice in the nomination or proceedings of the official manager, whose extensive powers enable him to compromise with the members of the company *inter se*, or delay enforcing contributions to the prejudice of the creditors.

In both the cases already mentioned, the interests of the general body of creditors are most injuriously affected by the right of individual creditors to proceed to judgment and execution against individual shareholders, by which means the estate of the share-

holders may be exhausted for the benefit of particular creditors, instead of being applied for the benefit of the general body of creditors.

In cases where the winding-up is in the Court of Chancery, under the Joint-Stock Companies Act, 1856, neither the creditors nor the shareholders have any voice in the appointment of the official liquidator.

In cases where the winding-up is in the Court of Bankruptcy, under the same act, the creditors, where the winding-up takes place at the suit of a creditor, have the right to appoint an official liquidator, to act concurrently with the official liquidator appointed by the court; but where the winding-up is at the suit of a contributory, the contributories alone have such right.

Whether, however, the winding-up under the act be in chancery or in bankruptcy, the court has power, after the order for winding-up, to stay all actions and suits against the company, and to set aside fraudulent preferences; the assets are to be applied by the court in a due course of administration, while falsification of books or other documents, by any director, officer, or contributor, is made a misdemeanor; and where a dividend has been paid when the company was known to be insolvent, the directors are made liable to the amount of such dividend.

Secondly, with reference to the interests of shareholders.

In cases where the winding-up of a company is under the 7 & 8 Vic. c. 111, or under the 11 & 12 Vic. c. 45, and 12 & 13 Vic. c. 108, as has been already adverted to, there is no protection to shareholders or their property against the executions of creditors, however numerous, even where the shareholders may be willing to pay far more than their just proportion towards the liabilities of the company. The recent decision of the Lord Chancellor and Lord Justice Turner, in the case of the Royal British Bank, shows that considerable doubt is entertained whether even, without a winding-up order, a receiver for the protection of the shareholders can be appointed under the 7 & 8 Vic. c. 111, the provisions of which it is intimated are to that extent affected by the 11 & 12 Vic. c. 45, and 12 & 13 Vic. c. 108. Shareholders are, therefore, compelled to seek the protection of the bankrupt laws, or are induced to make away with their property and leave the country. The liabilities of those shareholders, who are unable or unwilling to have recourse to such expedients, are thus increased. The committee have already pointed out how injuriously such proceedings affect the interests of the creditors generally. Considered with reference to the interests of shareholders,

nothing can be imagined more disadvantageous or more unjust.

A company registered under the Joint-Stock Companies Act, 1856, is constituted a corporation, and the shareholders are only liable under sects. 61, 62, and 63, and cannot be reached by proceedings on the part of creditors. Where, however, companies which have previously been registered under the 7 & 8 Vic. c. 110 are registered under this act, the rights of creditors accruing before such last registration are saved.

In cases under this act, where the winding-up is in the Court of Chancery, the shareholders have no voice in the appointment of the official liquidator, nor where the winding-up takes place in bankruptcy at the suit of a creditor.

It is obvious, from these considerations, that the mode of winding-up under the Joint-Stock Companies Act, 1856, to whatever objections it may be liable, is by far the most advantageous both to creditors and shareholders.

DEBATING SOCIETIES.

THE BIRMINGHAM LAW STUDENTS' SOCIETY.

July 8, 1857.—*Moot Point*, No. 226.

A traveller by the B. railway brings an action against the C. Railway Company for injuries caused by a collision of a train of the latter with a train of the former. Is it a good plea that the collision was caused in part by a want of ordinary care in the driver of the train in which the plaintiff was travelling?

The above suggested two points for consideration. First, whether a passenger by railway or any public conveyance is so far identified with the driver of the vehicle in which he voluntarily becomes a passenger that the negligence of the driver is as his own negligence in point of law? And, secondly, assuming the plaintiff to contribute to the injury of which he complains by his own negligence, or want of ordinary care and caution on his part, by an absence of that prudence which any rational individual would exercise in discharging the ordinary duties of life, whether in such case the above plea would be good?

The general rule on the subject may be thus stated:—Where a plaintiff complains of an injury arising to him from the negligence of the defendant, it is open to the latter to show that the plaintiff, by using common and ordinary caution, might have avoided it, or that the immediate and proximate cause of the injury was the unskilfulness or negligence of the plaintiff; and if, by ordinary care, he might have avoided it, he is the author of his own wrong. This proposition is fully established by the cases of *Butterfield v. Forrester* (11 East, 60),

Flower v. Adam (2 Taunton, 315), *Lack v. Seward* (4 C. & P. 106), *William v. Holland* (6 C. & P. 24), *Woolf v. Beard* (8 C. & P. 379), *Marriott v. Stanley* (1 Scott's N. R. 392), and *Bridge v. Grand Junction Railway Company* (3 M. & W. 244).

As to the first of the above points, it was contended, on the authority of *Thorogood v. Bryan* (18 L. J. R., C. P., 336), that the affirmative was correct. This case decides that, where the death of a party riding in A.'s omnibus is caused by the wrongful act of the driver of B.'s omnibus, but, in fact, the conductor of A.'s omnibus was guilty also of negligence, the representatives of the party killed cannot sustain an action for compensation, under Lord Campbell's Act, against the owner of B.'s omnibus. The decision appears to have proceeded on two grounds. First, that the conductor of A.'s omnibus constituted the agent of the deceased party by the latter's becoming a passenger; and, secondly, that the act of the negligence of the agent is the negligence of the deceased passenger, and, consequently, no action can be sustained for an injury leading to his death. For the negative, it was submitted, that the decision was most strange, and not good law, and two cases were relied on to support the argument (*Rigby v. Hewitt*, 19 L. J. R. Ex. 291, and *Greenland v. Chaplin*, 293), but it will be observed, on reference to, and close investigation of, these cases, that the judgments of the court under the peculiar circumstances of each case are not by any means inconsistent with the doctrine laid down in *Thorogood v. Bryan*.

Up to the present time, *Thorogood v. Bryan* not having been overruled, we may consider the first point as so far settled. Now as to the second, with regard to the form of the plea. In *Bridge v. Grand Junction Railway Company*, the defendants pleaded that the parties having the management of the train in which the plaintiff was, managed it so negligently and improperly that, in part by their negligence, as well as in part by the defendant's negligence, the defendant's train ran against the other and caused the injuries to the plaintiff. It was held, on demurrer, that the plea was bad in form as amounting to not guilty, and in substance for not showing, not only that the parties under whose management the plaintiff was were guilty of negligence, but also that by ordinary care they could have avoided the consequences of the defendant's negligence. The plea was tantamount to the general issue, which latter has been the plea employed in the cases referred to, as well as in the more numerous cases relating to this subject, and which, prior to the Pleading Rules of Hilary Term 1853, permitted the defendant to give in evidence on the trial any fact calculated to show that plaintiff contributed to

the injury by his own negligence; and now, as such matter must be pleaded specially looking at the general rule on the subject, the case of *Thorogood v. Bryan*, and the other cases, we cannot otherwise conclude than that the plea on the moot point would be good by way of confession and avoidance.

The meeting decided in the affirmative, but with the belief that, whenever a case similar to that of *Thorogood v. Bryan* should again arise, the verdict will be for the plaintiff.

July 22.—Moot Point, No. 227.

A. conveys land to B. for an illegal purpose. Can A. avoid the grant as against B.?

The cases support the negative; little could be said to vindicate the affirmative, as it is opposed to a well-known maxim—that a party to a contract shall not take advantage of his own wrong; which is well supported at law by the cases on the subject, although equity has to some extent relaxed the general rule in favour of marriage brokerage contracts; for where money has actually been paid in pursuance thereof, equity has assisted the party to recover back; so that this would appear to break in upon the common law rule; for in no instance can money be recovered back at law when paid in pursuance of an illegal contract; and in actions on bonds given for illegal purposes, the illegality may be pleaded as a defence to the action (see *Collins v. Blantern*, 1 S. L. C. 263, and notes). Again, it was contended that A. is estopped by his own act, and therefore the estate gets safely vested in B. For the affirmative was cited *Gaslight Company v. Turner* (9 L. J. R., C. P., 75). Contract for rent on lease. Plea that lease was granted for an illegal purpose; plea a good answer to action. Per L. C. J. Tindal it had been urged, on argument, that the term being vested in defendant, he might hold free from rent. Semble, if action of ejectment for breach of any condition in the lease, it would be free from the objection of enforced contract. Semble, that plea in present action would prevent defendant from denying that lease void. For the negative see *Roberts v. Roberts* (2 B. & A. 367). On ground that no person could allege his own fraud in order to invalidate his own deed, on authority of *Montefiori v. Montefiori* (1 Bla. 363); see also *Phillipotts v. Phillipotts*, 20 L. J. R., C. P., 11; *McKinnell v. Robinson*, 7 L. J. R. Ex. 149; see also observations of judges in *Jerret v. Hill*, 23 L. J. R., C. P., 185; and cases collected in *Story's Equity*, sec. 298, and notes, Vol. I.

The meeting approved of the negative.

A. FERDAY, Corresponding Secretary.

THE LIABILITIES OF ASSIGNEES OF LEASES.

IN the *Jurist* for the 25th of July last, there is an article upon the liabilities of the assignees of leases, which is worth the perusal of those who may desire to be informed on the state of law on the above subject. In the first place, the liability of a legal assignee is stated in the following terms:—"At law the assignee of a term, whether assigns be named in the lease or not, is bound, so long as he continues in possession, to pay the rent and perform such of the covenants comprised in the lease as run with the land. On covenants simply collateral or personal, however, he is never liable, even though assigns be named therein; while there is a small intermediate class of covenants which do not concern things appurtenant to the land and in being at the time of the demise, and which are not therefore real, but are at the same time not merely personal to the lessee, inasmuch as they relate to something to be done upon the land, and of which the assignee would have the benefit, and by these he is obliged only when the lessee has covenanted for his assigns as well as for himself. The liability of the assignee of leasehold property at law is founded upon the privity of estate between the lessor and the assignee of the lessee, which is created by the execution of the deed of assignment; and therefore it is not necessary, in order to raise it, that the assignee should be in the actual possession of the premises, but only that he should have the legal estate, the word "possession" being at law nothing more than a synonym for the possessory right; and directly the assignee parts with the legal estate, the liability ceases, except for breaches of covenant committed during the time of his enjoyment. It has also been established, in spite of some fluctuations of judicial opinion, that a mortgagee who has obtained an assignment of the demised premises, instead of an underlease, is in the same position as an assignee of the ordinary kind, and may therefore be sued upon the covenants in the lease for breaches committed during the continuance of his possession, although the premises may have been all the while occupied by the mortgagor. If, however, he can by any means get quit of his legal interest, he will thereby exonerate himself from all future claims; and to this end, if he cannot induce the lessor to accept a surrender, he will be justified, and not restrained by a court of equity, in assigning over the lease to a person of no substance, or actually insolvent (*Onslow v. Corrie*, 2 Mad. 330; *Rowley v. Adams*, 4 My. and C. 534).

With respect to the liability of an equitable assignee of a term of years, reference should be

made to 9 Law Chron. pp. 315, 370, and the cases there noticed, especially *Cox v. Bishop* (3 Jur. N. S. 499; 28 Law Tim. Rep. 301; 5 Week. Rep. 437); and *Walters v. The Northern Coal Mining Company* (5 De Gex M. and G. 629; 2 Jur. 1), as being the most recent decisions. With respect to the latter case, it is said from the judgment of the Lord Chancellor we may eliminate the following propositions:—First, the rights of a landlord, against those who occupy his land, are legal rights. Therefore, where land is demised to one person as a trustee for another, the lessor cannot treat the cestui que trust as an equitable debtor for the amount of the rent, notwithstanding that the cestui que trust has assumed all the attributes of lessee; and the case of *Clavering v. Westley* (3 P. Wms. 402), so far as it contradicts this maxim, must not be regarded as an authority. "If," argued his Lordship, "the cestui que trust should, as he certainly might, call on the lessee to assign the legal interest to him, the landlord would have a legal remedy by action against him as assignee. Surely it could not then be contended that the landlord could sue in equity as well as at law; and yet, if before the assignment he had an equitable right against the occupier, how could the occupier destroy that equitable right by an act to which the landlord was no party?" Secondly, if there was a previous contract between the cestui que trust and the landlord, that the latter should grant, and the former or his trustees accept, the lease, the landlord would be entitled to a specific performance of that contract; but if in a case of this sort there could be no decree for a specific performance of an agreement for a lease, there could not be any relief at all in a court of equity. In the case of *Cox v. Bishop* the defendants had agreed to purchase and take assignments of the interests of the lessees in certain coal-mines and closes of land, and had entered into possession, and acted as assignees; and the point raised was, whether they had become liable to be sued by the lessor for rent which had accrued due, and for damages for breaches of covenant which had been committed, during their enjoyment. The Lords Justices adopted the principles enunciated by the Lord Chancellor, that neither an equitable assignment alone, nor possession and enjoyment alone, nor both together, could give the landlord a title to relief in equity, and that the liability by reason of occupation, if any, ought to be asserted at law; and they decided, that without special circumstances, such as an impediment to proceeding at law, for the removal of which the assistance of the court was required, they had no jurisdiction to interfere. Sir G. J. Turner, L. J., further stated, that the same argument was applicable to every kind of assignment, whether by way

of mortgage, or otherwise howsoever; and that the difference in the case of a mortgage and of an equitable assignment by other means than a mortgage, was not a difference in the relation between the lessor and the assignee, but in the relation between the assignee and the assignor. Finally, his Lordship observed, in corroboration of the Lord Chancellor's remark with reference to an agreement for a lease, that the usual practice in equity was not to decree the payment of the rent and performance of the covenants, but to decree execution of the lease, and to leave the parties to maintain their respective rights under the instrument in a court of common law.

AMENDMENT OF BANKRUPTCY LAWS.

Lord Brougham has been now nearly thirty years trying his hand upon the bankruptcy laws, and he confesses that though many changes have been made in that long tract of time, no real reform has resulted. In fact, the failure is patent, from the want of business in the courts, arising from the disinclination of both debtors and creditors to take any proceedings in them where it is possible to avoid them. The busy ex-Chancellor has just introduced a new bill into the Lords; and on that occasion his lordship referred to the labours of the Mercantile Law Conference (under the auspices of the Law Amendment Society), and the grievances they allege. In the first place, they complained of the great expense attending the law; and in illustration of the truth of that complaint, his lordship mentioned that in 121 cases, a sum of £90,000 was collected, but only £44,000 distributed, the balance amounting to about 50 per cent. having been absorbed by the expenses. It appeared that a sum of £25,000 a year continued still to be paid for compensation to the commissioners of bankruptcy, who were removed by his bill in 1831; all of that sum came out of the pockets of the creditors in the Bankruptcy Court; and he proposed by the bill which he intended to lay on the table, to transfer that charge to the consolidated fund. The conference thought that the messenger, broker, and accountant could be dispensed with, and their duties transferred to the official assignee. He could not deny that the broker and accountant could be dispensed with, but he greatly doubted whether they could dispense with the messenger. He thought the messenger should be retained, subject to the authority of the commissioners, who might decide whether he should be employed or not. The mode of paying the official assignee was objected to, and he thought that the official assignee should be paid partly by salary and partly by fees. The conference complained of the ill-attendance of

some of the commissioners, and, where it was found necessary, the Lord Chancellor should insist upon a more regular attendance. There should be also a remedy applied to the defect in the arrangement clauses, under which it had been decided that there could be no assignment whatever, unless every article of the bankrupt was given up, down to his wearing apparel. He proposed to provide a remedy by his bill for the evils to which he referred, but he should be exceedingly unwilling to say that there were no other parts of the recommendation of the conference to which he could assent, because he had a strong opinion on some of them. For example, it was complained that there was an appeal from the Bankrupt Commissioner, who had seen the bankrupt and witnesses, and was acquainted with the circumstances of the case, to a Court of Appeal that could know nothing about the circumstances of the case or the parties. The noble and learned lord concluded by laying his bill on the table. The Lord Chancellor said the address of his noble and learned friend must create melancholy feelings in the minds of those who like himself were anxious for the improvement of the law. No subject had received more attention, and no law had received more amendment, from time to time; and yet the result was, that, bad as it was in 1831, it appeared to be very little better in 1857, and they would have to do their work over again. The diminution of the expenses of the Court of Bankruptcy was the subject of consideration; but he thought that if they altered the mode of paying the official assignee, the result would be to diminish the quantity of assets brought in. His attention had only been called in one instance to a case of neglect on the part of a commissioner, and in that case he took care that the practice complained of should be discontinued. He had never heard that any neglect had taken place in London, where the whole establishment was much larger than it need be. He promised to give the bill of his noble and learned friend the most respectful attention, and trusted that the law would be rendered less expensive and dilatory. He objected to the remarks made respecting the Court of Appeal, and could say that, when he sat in the Appeal Court as one of the Lords Justices, they had the bankrupts and the witnesses in attendance before them. Lord Brougham said, that, so far from feeling discomfort or shame at the discovery that after twenty-five years there were matters in his act which required amendment, he had been constantly dwelling upon the necessity of watching over the working of the measure most jealously for the purpose of discovering defects and amending the law. The bill was then read a first time, but it seems doubtful if it will proceed any further; at least, it is almost

impossible that it can pass into an act this session. The Lord Chancellor also stated that the whole of the subject of the bankruptcy laws was under the consideration of the Government, though with what object did not appear. There can be no doubt that the bankruptcy law is in an unsatisfactory state, and as little doubt that this is owing to the imperfect attempts made to reform this important branch of the law, and we think the result ought to inspire our would-be law reformers with a little more modesty.

EXAMINATION ANSWERS.

No. 8.—*Renouncing Executor surviving the proving Executor (ante, p. 11).*

GENTLEMEN,—Knowing your readiness at all times to give ear to anything that may appear in reason, and which may be of any utility to some of that numerous class of individuals (of which I form one myself) of which your work, above all others, is in every way admirably adapted for their benefit, will you allow me (with all due deference) to correct an error occurring in the 8th answer to the examination question of last term, in the conveyancing branch, "Proving executor, dying in lifetime of renouncing executor," where you say "that the personal representative of D. would be the proper party to assign the term if he appointed an executor." This is undoubtedly wrong. C., the renouncing executor, would be the proper party to assign the term, being the surviving executor; for, referring to 1 Prest. Abst. p. 186, it is there distinctly laid down that "where one or more executors renounce probate, and then other executors prove, and die in the lifetime of the disclaiming executors, the disclaiming executors must either prove the will, as they may do, or they must renounce the probate; and if they renounce the probate, administration *de bonis non* must be granted." And it is also stated, in Comyn's Digest ("Administration" G), that "if there be more than one executor, the office, on the death of one, devolves on the survivor, although the deceased executor may have been the sole acting executor, and the surviving executor may have refused the office in the deceased executor's lifetime, and actually renounced."

Under these circumstances there is no doubt C., as the surviving executor, would stand as the legal representative of the testator, and would be the proper person to assign the term; but if he renounce probate on the decease of the proving executor, then letters of administration *de bonis non* of the original testator must be taken out.

Trusting you will excuse the liberty I have taken,
—I am, &c., THOS. H. ALDERTON.

14, Paddington-green, July 17.

NOTE.—Our correspondent correctly enough states the law according to the old authorities; but since Comyn and Preston wrote, a different doctrine has been adopted, greater efficacy being given to the renunciation at the time of the proof by the acting executor. The following two cases, especially the latter, should be consulted—viz., *Cummins v. Cummins* (3 Jon. and Lat. 64) and *Venables v. East India Company* (2 Exch. Rep. 633; 18 Law Journ. Exch. 266; 12 Jur. 855). In the first case, the following points were decided—viz., 1. That probate to one of several executors, *the right of the other being reserved*, enures for the benefit of all. 2. That upon the death of the executor to whom probate has been granted, the other executor may accept the office; and upon his so doing, he fully represents his testator without further probate. 3. That a slight act of intermeddling with the assets by the surviving executor, who had not joined in proving the will, will amount to an acceptance of the office of executor, and will preclude him from afterwards refusing to act. In other words, he cannot, after such intermeddling, say he was not executor. In the secondly mentioned case (*Venables v. East India Company*), it was held that a formal renunciation (or refusal) of probate by an executor named in a will is *absolutely binding and conclusive on him*, unless he afterwards comes in and retracts it. Therefore, where one of two executors having, in due form of law, in the proper ecclesiastical court, expressly renounced all right, title, and interest to probate, and refused to act in any way in the execution of the title, his fellow obtained probate and afterwards died, whereupon letters of administration *de bonis non cum testamento annexo* were granted to a third party, but the surviving executor, although then living, was not previously cited to take or renounce probate; it was held that the administrator *de bonis non* was the legal personal representative of the testator. We think our correspondent will, after perusing these decisions, agree that our answer is correct.—Eds.

NEW ORDERS IN CHANCERY.—July 18, 1857.

A few new Orders in Chancery have just been issued, which it will be necessary for the practitioner as well as the articled clerk to study. They relate—1. To the enforcement of orders and decrees of the Court of Chancery (amending previous orders, and affecting the Answer, No. XV., at p. 391 of vol. 8, *LAW CHRONICLE*). 2. To process for the enforcement of orders and decrees for payment of money or costs against *clergymen* where *nulla bona* is returned:—

Execution for enforcement of orders and decrees of

the Court of Chancery.—The first of the new orders directs that the orders of the 11th of April, 1842, shall be amended, as to Numbers XI. and XII., in manner following (that is to say):—

XI. If any party or person who is, by an order or decree made in any suit or matter, ordered to pay money, or to do any other act in a limited time, shall, after due service of such order or decree, refuse or neglect to obey the same according to the exigency thereof, the party or person prosecuting such order or decree shall, at the expiration of the time limited for the performance thereof, be entitled to a writ or writs of attachment against the disobedient party or person; and in case such party or person shall be taken or detained in custody under any such writ of attachment without obeying the same order or decree; then the party or person prosecuting the same order or decree shall, upon the sheriff's return that the party or person has been so taken or detained, be entitled to a commission of sequestration against the estate and effects of the disobedient party or person; and in case the sheriff shall make the return *non est inventus* to such writ or writs of attachment, the party or person prosecuting such order or decree shall be entitled, at his option, either to a commission of sequestration in the first instance, or otherwise to an order for the serjeant-at-arms, and to such other process as he hath hitherto been entitled to upon a return *non est inventus* made by the commissioners named in a commission of rebellion issued for the non-performance of an order or decree.

XII. *Decree, &c., stating time for performance of Act.*—Every order or decree made in any suit or matter, requiring any party or person to do an act thereby ordered, shall state the time, or the time after service of the order or decree, within which the act is to be done; and upon the copy of the order or decree which shall be served upon the party or person required to obey the same, there shall be indorsed a memorandum in the words or to the effect following, viz.:—

"If you, the within-named A. B., neglect to obey this order [or decree] by the time therein limited, you will be liable to be arrested under a writ of attachment issued out of the High Court of Chancery, or by the serjeant-at-arms attending the same court, and also be liable to have your estate sequestered for the purpose of compelling you to obey the same order [or decree]."

2. *Beneficed Clerk.*—*Process after return of nulla bona.*—If it shall appear upon the return of any writ of fieri facias, or any writ of elegit, issued in pursuance of the General Orders of the 10th May, 1839, that the person against whom such writ shall have been so issued is a beneficed clerk and has no goods

or chattels nor any lay fee in the bailiwick of the sheriff to whom such writ shall have been directed, the person to whom the sum of money or costs mentioned in such writ is or are payable shall, immediately after such writ, with such return, shall be filed as of record, be at liberty to sue out one or more writ or writs of fieri facias de bonis ecclesiasticis, or one or more writ or writs of sequestrari facias, in the form stated in the schedule hereto, or as near thereto as the circumstances of the case may allow.

3. *Indorsements on writ against clergyman.*—On every such writ of fieri facias de bonis ecclesiasticis, or writ of sequestrari facias, so to be issued as aforesaid, there shall be indorsed the words "By the Court," and also thereunder the calling (if any) and place of residence (if any) of the party or person against whom such writ shall be issued, and also the name and residence or place of business of the party or solicitor at whose instance the same shall be issued; and every such writ shall be also indorsed for the sum to be taken or levied, according to the form used upon like writs issuing out of the superior courts of common law.

4. *Execution of writ against clergyman.*—Such writs, when sealed, shall be delivered to the bishop, and shall be executed by him, as nearly as may be, in the same manner in which he doth or ought to execute such like writs issuing out of the superior courts of common law; and such writs, when returned by the bishop, shall be delivered to the parties or solicitors by whom respectively they were sued out, and shall thereupon be filed as of record in the office of the Clerks of Records and Writs of this Court; and for the execution of such writs the bishop or his officers shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority for the execution of the like writs issuing out of the superior courts of common law.

5. *Solicitor's charge for writ, &c.*—For every such writ so to be issued in pursuance of these Orders, there shall be allowed to the solicitor at whose instance any such writ shall be issued, the sum of 6s. 8d. for instructions for the said writ, and the sum of 13s. 4d. for preparing the same, and a fee of £1 shall be paid by means of a stamp for examining and stamping every such writ at the office of the Clerks of Records and Writs, and there shall be also allowed to such solicitor the further sum of 6s. 8d. for attending to lodge the same at the bishop's registry, and for attending to instruct the officer charged with the execution of such writ.

THE MONTH'S SUMMARY.

Annexing conditions to a bankrupt's certificate [vol. 3, pp. 160, 161, 404].—By the 198th section of the Bankruptcy Consolidation Act, the commissioner is allowed to annex such conditions to the certificate as the justice of the case may require. In a late number of the *Jurist* (part 2, p. 257), some of the cases decided on this provision of the statute are noticed. It has been decided that it must be read as if the words were "conditions within the jurisdiction and power of the court" (per Alderson, B., in *Grace v. Bishop*, 11 Exch. 424); and also that no condition can be annexed to the certificate which contravenes the policy or purposes of the bankrupt law. Thus in *Exparte Hammond* (24 L. J. Bank. 2) it was thought unwise and impolitic to impose a condition that the certificate, either wholly or partially, should not have the effect of protecting after acquired property. "If," it was said, "the bankrupt began to trade again, he laboured under a debt undischarged, and his undischarged creditors had power to enforce process against him, to the prejudice of subsequent creditors" (per Sir G. J. Turner, L. J.). Instead of annexing such a condition, "the better course is to suspend the certificate, with liberty to apply" (per Sir J. L. Knight Bruce, L. J., in *Exparte Culhañe*, 2 Jur. N. S. part 1, p. 863). Nevertheless, extreme cases may occur in which justice may require such a course to be taken (per Sir G. J. Turner, L. J., in *Exparte Hodgson*, 3 De G. Mac. and G. 556). Thus, in *Exparte Burghes* (1 Fonb. N. R. 116), Mr. Commissioner Fonblanque held, that where a bankrupt has committed breaches of trust, the court, in allowing the certificate, will annex a condition, that it shall not be available against the *cestuis que trust*; and in *Exparte Wakefield* (4 De G. and S. 18; 15 Jur. part 1, p. 961), where a bankrupt was alleged to have committed breaches of trust, it was ordered that the certificate should be so worded as not to protect him from any demands against him as trustee. In *Exparte Hollingworth* also (4 De G. and S. 44; 15 Jur. part 1, p. 914) a certificate was granted, with a condition that it should do no more than protect the bankrupt's person from arrest. The bankrupt was a shipowner and insurance broker, and in 1838 had been made bankrupt, and paid 3s. 6d. in the pound. In 1835 he had made one composition with his creditors, and in 1846 he had made another, under which they received 5s. in the pound. In 1849 he signed a declaration of insolvency, and placed it in the hands of his solicitor. Afterwards he contracted new debts, without disclosing this circumstance, although without any false statement or misrepresentation. Sir J. L. Knight Bruce, V. C., alluding to the stat. 6 Geo. 4, c. 16, s. 127, ap-

pears to have said, although there is a slight variance between the reports, that the circumstances of the former bankruptcy and compositions imposed on the bankrupt the burthen of showing, that, if he was entitled to any certificate, he was entitled to something more than a protection for his person, and that, otherwise, he ought not to be put in a more favourable situation than he would have been in under the former statute. However, in *Ex parte Hodgson*, where a similar condition had been annexed by a commissioner to the certificate of a bankrupt, who, on a former occasion, had compounded with his creditors, paying them only 5s. in the pound, it was remarked by the court above, that the omission in the 12 & 13 Vic. c. 106, of a similar clause to that in the act of Geo. 4, that future assets were not to be discharged where, previously to the bankruptcy, there had been a composition, under which the trader had paid less than 15s. in the pound to his former creditors, was in the bankrupt's favour; and the condition was rescinded.

The new and old Solicitors-General—Mr. Keating and Mr. Stuart Wortley.—In reference to the present and late Solicitors-General, the *Jurist* says:—"The appointment of Mr. Keating to the office of Solicitor-General is honourable to the Government and to himself. He has the well-earned reputation of being a sound lawyer, an industrious, painstaking, earnest advocate, and a gentleman of high professional honour. The independent course which he has taken in Parliament affords the best answer to those who assert that lawyers vote with a view to their own interests. To his predecessor, Mr. Stuart Wortley, we beg to offer our sympathy, and to express our best wishes for the speedy re-establishment of his health, so that the public may not long be deprived of his valuable services, both as a legislator and a lawyer."

Appeals to the Lords [vol. 2, pp. 59, 103—109; vol. 3, pp. 13, 245, 287].—In a recent case in the Lords, on appeal, Lord Brougham went out of his way to make some observations on the judicial force of the Lords, which has again called attention to the jurisdiction of the Lords on appeals; and, though we have before alluded to the subject, it may not be amiss to mention the principal recommendations of the Report of the Committee of the 20th of May, 1856. They agreed that it was expedient to retain the appellate jurisdiction of the House of Lords; and after stating the principal objections raised as to the present constitution and practice of the House as a court of ultimate appeal, they came to the following conclusions:—First, that although instances had been adduced where appeals in the House had been decided, with advantage to the law and satisfaction to the public, by the Lord Chancellor or one

law lord alone, yet that the House, as a general rule, should be able to reckon on the attendance of not less than three law lords to assist in the hearing of all appeals; but in making this recommendation the committee by no means wished to discourage the attendance of other members of the House. The committee then propose, first, the creation of two deputy speakers of the House of Lords, being persons who have held some high judicial office for not less than five years, and who are to receive a salary of £6,000 a year. 2. They propose that the House should be enabled to authorise its sittings for the hearing of appeals to be held notwithstanding a prorogation. 3. They suggest no fixed or invariable rule as to there being a Scotch judge as a member of the appellate court. 4. They leave the questions as to the unnecessary expenses of appeals to be dealt with by the Lord Chancellor and the Lords who assist him in hearing appeals. 5. They think that the mode of delivering judgments is a matter of discretion, but they recommend that those who hear appeals should have leave to sit at the table, and deliver their judgments sitting. That in order to avoid the difficulty of conferring hereditary peerages on persons having judicial offices connected with the House of Lords, persons appointed to life peerages should enjoy all the privileges of Peers of Parliament, but that not more than four should have seats in the House at one time. A bill founded on this report was thrown out by the Commons, and in doing so they had the general feeling of the country with them; for it is evident, notwithstanding the remedies suggested by the committee of the House of Lords for some notorious defects, the measure had not received that consideration which one of so much importance deserved; and, in fact, it was one calculated rather to preserve what has been termed the "privileges" of the House, than to provide the best possible supreme court for the use of the public. A much more comprehensive scheme is that of the present Attorney-General (Sir Richard Bethell), who proposed that the House of Lords should exercise its appellate jurisdiction through the medium of a Judicial Committee composed of Peers; that the jurisdiction and functions of the Judicial Committee of the Privy Council should be vested in the Judicial Committee of the Lords, so that there might be (in the House of Lords) one single uniform appellate tribunal for the whole empire; and as he proposed that the court should sit during five days in every week, except the vacations observed in Chancery, and that it should be constituted by the Lord Chancellor and four other members, it is to be presumed that this plan does not contemplate the Lord Chancellor sitting in any other court, so that he would not

longer have attached to his office the disagreeable privilege or duty of sitting on appeals from his own decrees.

Abolition of grand juries.—Sir F. Thesiger has brought in a bill to abolish grand juries within the metropolitan police district. In introducing his bill, Sir Frederick said he wished it to be understood that he was not prepared to prevent the assembling of grand juries in the provinces. He deemed it advantageous to the public that magistrates and gentlemen of the counties should be associated with the judges in their periodical administration of criminal justice throughout the country. The appointment of a public prosecutor, or the adoption of some improved system of preliminary investigation into offences, might hereafter render it necessary to consider the whole subject of grand juries; but he strictly confined himself at present to the case of the metropolitan district, to which any sound arguments against grand juries in general would apply with peculiar force. It was superfluous to employ any antiquarian research in now discussing this question; suffice it to say that grand juries were originally viewed in the light of public accusers; but in the reign of Edward III., when justices of the peace were introduced, their functions underwent a change. Ultimately, instead of possessing any original jurisdiction, a grand jury became merely a tribunal to receive evidence, and decide whether there was a *prima facie* case for sending accused persons to take their trial. This was a most important duty, which could be safely and conveniently superseded only where a better system had been provided. This was precisely the case of the Metropolitan Police District, where magistrates of experience and legal talent acted continually in the face of the public. Their principal functions consisted of receiving charges against alleged offenders, and of examining witnesses in the presence of the accused, who was confronted with his accusers, and had an opportunity of cross-examining them and the rest of the witnesses. After a careful investigation, conducted under the most favourable circumstances for arriving at a correct decision, the magistrate determined whether there were sufficient grounds for sending the prisoner to trial. The depositions originally taken were transmitted to the court to which the offender was committed, and every formality essential to the protection of the public and to the prevention of unfounded charges was completed. But another preliminary ceremony had to be gone through before the trial. Twenty-three gentlemen, generally unaccustomed to legal inquiries, were collected together in a private room, where, with closed doors, under an oath of secrecy, and in the absence of the accused, they proceeded to re-investigate the very point already

determined by the committing magistrate—viz., whether there was a *prima facie* case for putting the person charged upon his trial. With nothing to guide them but the indictment containing the accusation and the names of the witnesses, they had to grope their way in the dark, frequently through a labyrinth of complicated facts. If the grand jury, under these unfavourable circumstances, found a true bill, their labours were perfectly supererogatory. If, on the other hand, they threw out the bill, their interference was often purely mischievous. Justice in their hands was liable to miscarry, either from a misconception as to their own functions, some jurymen imagining that they had to decide on the guilt or innocence of the accused; or from the witnesses being tampered with, and induced to suppress the evidence they had previously given when before the magistrates. This the witnesses could do in perfect security, because their examination before the grand jury was conducted in secrecy. In fact, the grand jury system multiplied the chances of escape for the guilty to such an extent that it was called "the hope of the London thieves." The innocent would be benefited by the change he proposed, because, after such a person had been once committed by a magistrate, his innocence would be established in the face of the country if he took his trial; whereas a suspicion would probably attach to him, even though the grand jury threw out the bill against him, owing to the reasons for their decision being unknown to the public.

Registration of titles.—It appears that we are to have a registration bill this session; for Lord Brougham has introduced such a measure, though we should suppose he does not anticipate making any progress this session. It becomes the profession to keep a sharp look out to ascertain that its interests are not prejudiced by the bill: indeed, we do not see how it can be otherwise, from the avowed object of the originators of the scheme, and to which we have before drawn attention.

Sham county court notices used by debt collectors and creditors.—We have noticed one case of a conviction for using sham county court notices for collecting debts, and we are told that at Exeter a respectable tradesman has been committed for trial on a charge of forging the name of the registrar of the court to an illegally concocted summons. The document had been purchased from an itinerant hawkcr, and had then, in order to make it appear genuine, been signed with the registrar's name, and posted in Exeter, so that the debtor might be induced to believe that the notice came from the office of the registrar.

Mortgagee—Costs of, not allowed where he claims more than is due to him, and has a balance of pro-

ceeds of sale of the mortgage property in his hands (Tanner v. Heard, 29 Law Tim. Rep. 257).

Landlord and Tenant—Landlord supplying timber—Non-removal by tenant.—A tenant cannot, on quitting, remove a building for which the landlord supplied part of the timber, and the tenant the remainder (Smith v. Render, 29 Law Tim. Rep. 264).

Alien—Suing.—An alien (perhaps even an alien enemy) may sue to prevent a fraudulent injury to his property (The Collins Company v. Cohen, 4 Law Chron. 42; 29 Law Tim. Rep. 245).

Life insurance—Action against company—Evidence of valid contract.—In an action on a life policy granted by a company under the 7 & 8 Vic. c. 110, it is not necessary for the plaintiff to produce the deed of the company, or show that the contract was entered into with all due formality according to the deed (Charles v. National Guardian Assurance Company, 29 Law Tim. Rep. 246; 4 Law Chron. 51).

Lunatic, pauper—Irremovable—Old orders—Liability of parish of residence.—The effect of the 10 & 11 Vic. c. 110, and the 16 & 17 Vic. c. 97, is to relieve the parish of settlement of a lunatic pauper of the maintenance of the pauper at the expense of the union of the parish of residence, or at the expense of the parish of residence, if it is not in a union: these acts apply not only to future orders, but to those made prior to its passing (Knowles v. Trafford, 29 Law Tim. Rep. 248).

Will—Englishman domiciled in France.—The will of an Englishman domiciled in France is invalid, though executed in the English form, if it be not conformable to the law of France (Bremer v. Freeman, 29 Law Tim. Rep. 251; 4 Law Chron. 46).

NOTE.—Supposing the new bill to remedy the state of the law shown by the above decision not to pass, it will be well to bear in mind that if a British subject writes his will in his own handwriting (hence called a holograph will), and then executes it according to the English form, it will be valid in every court of every European country, whatever may be the testator's domicile, and wherever his property may be situate (1 Sol. Journ. 538).

Bankruptcy—Proof—Bill of exchange—Part payment.—The holder for value of a bill of exchange, who has received part of the amount from other parties to the bill, cannot prove for the full amount of the bill against the accommodation acceptor, but only for the amount actually due at the time when the proof is tendered (Exp. Taylor, 29 Law Tim. Rep. 254).

Dismissal of bill without costs—Decisions overruled. If a plaintiff files a bill upon the authority of decisions afterwards reversed, he may dismiss his bill without paying costs (Lister v. Leather, 29 Law Tim. Rep. 255; 4 Law Chron. 47).

Evidence—Leave to file affidavits after time has expired, will be granted under peculiar circumstances, as where near the last day for closing evidence the opposite party has filed affidavits containing allegations not previously made, affecting the character and credibility of the party's witnesses, and calculated to prejudice their evidence (Scott v. Corporation of Liverpool, 29 Law Tim. Rep. 256; 4 Law Chron. 47; 5 Week. Rep. 641, 669).

Manslaughter—Act of commission is not actually essential; culpable negligence, if it would, being by design and of malice prepense, amount to murder, constitutes manslaughter (Reg. v. Hughes, 3 Jur. N. S. 696; 29 Law Tim. Rep. 266).

Truck Act—Contractor by the piece.—The Truck Act does not apply to one who enters into a contract to do certain work at so much per measure, or number, or weight, &c., under which he is not bound to bestow his personal labour (Ingram v. Barnes, 29 Law Tim. Rep. 297).

Habeas Corpus.—Prisoner moving for new trial in a civil action in person is not entitled to a habeas corpus (Binns v. Moseley, 3 Jur. N. S. 694).

Attorney.—Client liable for the act of, and not the attorney himself, in obtaining evidence for a trial (Lee v. Everest, 29 Law Tim. Rep. 263), and for issuing a *ca. sa.* for a less debt than £20 (Collett v. Foster, 5 Week. Rep. 790; 4 Law Chron. 56).

Equity Judges' Chambers.—The opinion of the judge may be taken by any party on proceedings taken before the chief clerk in chambers (Re London and County Assurance Company, 5 Week. Rep. 794).

Mortgage—Proposed mortgage going off for want of title—Mortgagee's costs of investigating title.—A mortgagee cannot recover the costs of, and incidental to, the investigation of the title of the mortgagor, with which the mortgagee has expressed himself to be dissatisfied (Melbourne v. Cotterell, 29 Law Tim. Rep. 293).

Charitable trust—Statute of Limitations.—The House of Lords has decided, in opposition to the Master of the Rolls, that charitable trusts are trusts within the operation of the 24th and 25th secs. of the 3 & 4 Will. 4, c. 27 (Magdalen College v. The Attorney-General, 3 Jur. N. S. 675; 29 Law Tim. Rep. 238; 4 Law Chron. 42, 43).

Winding-up Acts.—Building societies are within the above acts (St. George's Society, 3 Jur. N. S. 683; 4 Law Chron. 45).

Emblements.—A devise of land is entitled to, unless they are expressly bequeathed to another (Cooper v. Woolfit, 5 Week. Rep. 790).

Life Insurance—Fraud in effecting.—Where the person insuring a third party's life merely states his belief of the correctness of the statements of the life

and his referees (the truth thereof not being the basis of the contract), he is not affected by their fraudulent statements (*Wheulton v. Hardisty*, 5 Week. Rep. 784).

Bankruptcy protection—Creditor's debt not provable.—The protection granted to a bankrupt who has not passed his last examination extends to an arrest on the part of a creditor whose debt is not provable (*Exp. Shepherd*, 29 Law Tim. Rep. 298).

Payment into court.—Where a trustee admits that a trust fund is in his hands, he may be ordered to bring it into court on the application of a single cestui que trust, but where his conduct has been proper only the share of the cestui que trust will be ordered to be paid in (*Hamond v. Walker*, 3 Jur. N. S. 686).

Public Company.—The liability of a shareholder may be extinguished by an agreement between the directors and the shareholder that he should retire and transfer his shares for the benefit of the company, followed by an acceptance of such transfer (*Plate Glass Company v. Sanley*, 29 Law Tim. Rep. 277).

Vendor and purchaser.—Where purchaser dies before paying purchase-money, the heir is, notwithstanding 17 & 18 Vic. c. 113 (see 1 Law Chron. p. 154; vol. 2, pp. 136, 195; vol. 3, pp. 24, 96), entitled to have the purchase-money paid out of the personal estate (*Hood v. Hood*, 3 Jur. N. S. 684; 4 Law Chron. p. 41).

Vendor and purchaser.—A notice to take lands by a public company, followed by a valuation, will constitute an enforceable contract for sale and purchase (*Regent's Canal Company v. Ware*, 29 Law Tim. Rep. 274; 4 Law Chron. 40, 41).

Surety—Bill of sale of goods and distress.—A surety is discharged if the creditor takes the goods assigned by his debtor (his tenant) as a security, as a distress for rent in arrear (*Pearl v. Deacon*, 5 Week. Rep. 793; 29 Law Tim. Rep. 289).

Order and disposition—Previous insolvency.—A chattel reversionary interest omitted to be mentioned in an insolvent's schedule, is not in his "order and disposition" on his subsequent bankruptcy (*Re Rawbone*, 5 Week. Rep. 796).

Attorney—Taxation after twelve months—Overcharge—Pressure.—A bill containing gross overcharges will be ordered to be taxed even after twelve months from its delivery. So it seems it would in the case of pressure (*Re Strother*, 5 Week. Rep. 797).

Digging well—Injury to neighbour.—Any person may lawfully dig a well for water upon his own land, and a neighbour whose underground water is sensibly diminished, has no cause of action (*Chasemore v. Richards*, 5 Week. Rep. 780).

MOOT POINTS.

No. 6.—*Illegal Pawning, &c.*

D., a washerwoman, had intrusted to her household linen to wash. She pawned the linen, and was subsequently charged before the magistrates with larceny, and committed for trial at the sessions. On the trial, counsel for the defence objected that there was no larceny, as there was no felonious taking, the possession having been lawful in the first instance, and that consequently the Quarter Sessions had no jurisdiction, and D. could only be charged before the magistrates with illegally pawning. He was overruled, and the case tried, and D. was found guilty and sentenced to six calendar months, hard labour. It is apprehended the Quarter Sessions were wrong. Will some of your readers give me their opinion?

INQUIRER.

No. 7.—*Lease, Covenant to Repair, "Reasonable Wear and Tear" excepted.*

A lease contains a covenant to keep the demised premises in good and tenantable repair, and to surrender them at the end of the term in like tenantable condition, "reasonable wear and tear excepted." At the granting of the lease the premises were in good repair, but at the end of the term, they had become out of repair, merely from the tenants not doing any repairs. There had been no act of wilful waste on his part. Is the lessee liable on his covenant, or does the insertion of the exception as to "wear and tear" exempt him from liability? I am told that he is not liable (see also *Young v. Mantz*, 6 Scott, 277; *Burdett v. Withers*, 7 Adol. and Ell. 136); but I can scarcely think that the exception can have such an extensive operation—nullifying, in effect, the terms of the covenant.

W. H. S.

No. 8.—*Sale—Leasehold—Premises out of repair.*

A sale by auction of a leasehold house takes place in the house, and it is manifest to every bidder that the premises are out of repair, and there can, therefore, be little doubt that the bids were affected by the state of the premises. In fact, the vendor (the assignee of the lease) purchased three years before for a much larger sum. Since the sale, the superior landlord has given notice to the vendor to repair, and the purchaser refuses to complete his purchase. Is he not bound to complete, on the grounds that he must be considered to have had notice that a breach of covenant had been committed, and that he bought the premises in their actual condition? It would require much more than the amount of the purchase-money to put the premises into repair.

W. H. S.

RIGHT TO DIG WELLS.

Water underground [vol. 3, p. 305] — *Well, land-owner's right to sink*—*Ancient water-mill, use of prejudiced by pumping up subterranean supplies of stream*—*River Wandle* — *Board of Health* — *Riparian rights* [ante, p. 49].

The following case, supporting the right to sink wells upon a person's own lands, though 'injurious to his neighbour's wells, is one of great importance, as well as of some interest, more particularly as the court were not unanimous, Mr. Justice Coleridge, in a very able judgment, dissenting from the majority of the court. The arguments in support of the decision were stated by Mr. Justice Cresswell, who observed that a riparian owner cannot divert the stream for any purpose whether for irrigating or draining his land, or any other purpose, to the prejudice of the riparian owner. But it has never yet been held that a man might not drain his land, and so abstract water oozing through it, although such water would have otherwise found its way to a flowing stream; nor has it been contended that an owner of land situated near a flowing stream may not make a pond for use or ornament, although water would ooze into it which otherwise would have gone into the stream. Again, the owner of land near a flowing stream has hitherto been supposed to have the right of preventing water from oozing into his land from higher ground, provided he does not throw it back upon his neighbour; but he can no longer do that if water so percolated is to be put upon the same footing as a natural flowing stream, for that he cannot lawfully divert, even for the purpose of preventing injury to his land. But if he may prevent the water from coming into his land, why should he not allow it to come, and then collect it and use it; and to allow this, would be in direct conformity with a recent decision of the Court of Exchequer, in *Rawstron v. Taylor* (11 Exch. 369), and *Broadbent v. Ramsbotham* (11 Exch. 602). The majority of the court accordingly decided, that any person may lawfully dig a well for water upon his own land; and although the consequence may be the intercepting of underground water, which otherwise would have percolated and found its way to a river, and so to an ancient mill, the proprietors of which have enjoyed the use of the water so percolating for more than sixty years, the mill-owner cannot maintain an action for the abstraction of such water, although of sensible value to the working of the mill. The Croydon Local Board of Health sunk a well upon their own ground within a quarter of a mile of the commencement of the River Wandle, the flow of which the plaintiff and his predecessors, who owned an ancient mill, had enjoyed for more than

sixty years for working the mill. The board, by pumping at the rate of 5,000 or 6,000 gallons daily, abstracted the subterranean supplies, which otherwise would have percolated to the Wandle, and found their way to the mill, and the water thus intercepted was of sensible value to the working of the mill: Held, upon a special case (Coleridge, J., dissentiente), that no action could be maintained for intercepting, and so abstracting the water *Chase-more v. Richards*, 5 Week. Rep. 780). The following is the most important portion of the judgment of Mr. Justice Coleridge, and which we give, because it will well repay perusal. His lordship, after referring to the plaintiff's sixty years' enjoyment of the flow of water, proceeded: "It is clear that the defendant, by his act, has diminished the flow of water, and that he has done so by acts of which the natural effect, to be reasonably expected, was to produce the injurious consequences which have, in fact, resulted; and although the precise or complete effect of sinking a well, or pumping from it, could not be known beforehand, nor when it would appear, yet he must be taken to have known before so continually pumping that those consequences would result. The question then is whether any action is maintainable against him for these acts; and I am of opinion that this question is to be answered in the affirmative. I suppose that if the same acts which are now complained of, in respect of subterraneous water, had been done in respect of water on the surface, the plaintiff's right, and the injurious consequences to that right, and its enjoyment being supposed to be the same as now found, no question could have been made as to the right of action. The rights of the owner of land by or through which water flows, merely as such owner, and apart from any prescriptive title, are now well settled, and I do not know where they are more clearly stated than in 3 Kent's Commentaries, 439, 441. The whole passage is extracted in the judgment of the Court of Exchequer, in *Embrey v. Owen* (6 Exch. 369), and, therefore, I need not repeat it. But this passage is in strict accordance with the law of this country, as propounded in *Mason v. Hill* (1 B. and Ad. 1), and adopted in *Acton v. Blundell* (12 M. and W. 349), by the Court of Exchequer Chamber; but the passage in Kent is important, because it states correctly not only the general nature of the right in the absence of all interference with it by prescription or otherwise, but the limitation in the mode and extent of enjoyment which are involved in the very nature of the right itself. There is no property in water any more than in light or air, but the right to use it as it flows, and this extends equally to all the riparian proprietors above and below; but this right involves almost necessarily the right of abstraction

and temporary diversion for the purposes essential to the enjoyment or individual use of the property through or by which the water flows. This right, however, is restrained by due consideration for the equal rights of the riparian proprietors above and below. If even the reasonable necessity of one riparian proprietor were the only limit to his right of abstraction, he might, where the supply of water was limited, exhaust the whole; but this he cannot do, for by this he would violate the equal rights of all below him. Accordingly we find, in a note to the passage in 3 Kent, 440, two cases from the American reports referred to: *Arnold v. Foote* (12 Wendel, 380); and *Brown v. Best* (1 Wilson, 174), deciding this. In the former, where a spring of water rose in the land of A., and ran as a stream into the land of B., it was held that B. had no right to divert the stream from its natural channel to irrigate his land if he thereby exhausted the running stream, though there can be no doubt that this would have been a perfectly legitimate mode of exercising his natural rights as a riparian proprietor, if he thereby did not abridge the natural or conventional rights of any riparian proprietor lower down the stream. These common and equal rights, I need hardly say, may be varied to almost any extent by usage or prescription, from which a grant must be inferred, or by express grant. It follows, of course, that any infringement of what I may call the natural rights of a co-riparian is actionable; and upon this footing, as we know, actions are very commonly maintained, the rights being extremely valuable, but much open to infringement. But in the case of *Acton v. Blundell*, before mentioned, the law in respect to subterranean water came to be considered, and a different principle was laid down. It is necessary, therefore, now to examine what that case decided, and what principle is laid down. If that decision govern this case, I, for one, should be of opinion that, in a co-ordinate court, we ought to act upon it, whether approving it or not, and leave it to be reviewed and overruled if thought proper in the House of Lords; but if it does not appear that that decision governs the case in hand, we are at liberty to consider its principles before we apply them to materially different facts, especially if we find that those principles have already been thought unsatisfactory, and that decisions have been come to inconsistent with them. Now, it is certain that *Acton v. Blundell* does not decide the point now before us. In that case the plaintiff's rights stood on no user for twenty years, and in the judgment the court expressly states that it intimates no opinion whatever as to what the rule of law might be if there had been an uninterrupted user of the plaintiff's right during the last twenty years. Here the plaintiff relies on an uninterrupted

user for more than sixty years; he stands not on what I have called his natural right as a riparian proprietor, but on the conventional rights which are to be inferred from that user. Whether this claim can be made out or not is not the question now; it is, at all events, a different one, and was not in question in *Acton v. Blundell*. We are, therefore, at liberty to examine the general principles laid down in that case; and in the first place, with a view again of distinguishing it from the present, I remark that in establishing the distinction for which it contends between superficial and subterraneous waters, the judgment assumes certain facts: one of the most important, it should seem, is the ignorance of the landowner as to the course of the springs below the surface, the changes they undergo, and the date of their commencement. I confess I do not see how this ignorance is material in respect of a right which does not grow out of the assent or acquiescence of the landowner, as in a question of servitude, but out of the nature of the thing itself. Whether material, however, or not, it cannot, in any material sense, be said to exist here. The course by which the diverted water here percolates is not, indeed, seen, nor has it any open channel defined by visible marks; but its direction is as well known as if it ran in such a channel on the surface, and is regulated by as ancient and well known and as universal a law as the descent of any superficial stream. Further, the act of diversion cannot be considered an act done in ignorance. The plaintiff's ancient right the defendant must be taken to have known, and that the uninterrupted percolation of water to the stream was necessary to the fit enjoyment of it; he has diverted that percolation by a combination of continuous acts, of which the arbitrator finds the natural effect to be reasonably expected was to produce the injurious consequences actually experienced. What more could be said if he had dammed up and turned into an immense reservoir all or any material part of a stream flowing superficially to the supply of the river. Let me now examine the main principles which the judgment in *Acton v. Blundell* lays down in the conclusion as governing the right to subterranean waters. It is not stated very confidently, or very precisely; the words are these:—'We think the present case is not to be governed by the law which applies to rivers or flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath the surface of the land in mediately below his property, whether it is solid rock or porous ground, or veinous earth, or part water and part soil; that the person who owns the surface may dig therein and apply all that is there found to his own purposes at his freewill and pleasure; and that if in the exercise of such right

he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuria*, which cannot become the ground of an action.' Why water in a natural course of transit underground should as such be more a subject of individual property than water flowing above ground is not explained; but passing that by, it seems to have been overlooked, that the water draining into his neighbour's soil, as well as that collected in his neighbour's well, must, on the same principle, be that neighbour's property; indeed, independently of this, it is well established that water collected in a well is so much taken from the common stock and reduced into possession and become a subject of property. Now, it is certainly a novel principle, that by an operation on my own land I may both excusably abstract, and lawfully convert to my own use, the underground property of my neighbour. The principle to be practically consistent must go this full length: it must not merely excuse the abstractions as the unavoidable consequences of an act lawful in itself, but it must also justify the appropriation of the water abstracted, and actually make what was my neighbour's property my own by my own deliberate act done against his will, and with a full knowledge of the injury I inflict thereby. But, again, let it be conceded that this principle is a sound one, and that the landowner has a property in the water percolating through and under his land, the question still arises, and is a wholly distinct one, whether such property in the subsoil, of which the water is to be taken to be a part, may not be subjected by the owner to a servitude in respect of the millowners on the bank of the stream below. Why may not there be implied from the sixty years' enjoyment the assent and agreement of the proprietors of the bank above to permit such a transit of the water under their respective lands to the river as is essential to the further working of the mill, without which it must be taken there never could have been that usage on which the right was founded? What is there in the fact that a defined visible channel is wanting, when the existence and general course of the water is known as certainly as if seen and defined, which makes such assent and agreement an unreasonable implication? It is to be remarked, too, that such an implication is not inconsistent with the supposition that each landowner may reserve to himself the right of the reasonable and ordinary use of the water for the enjoyment of his own land and premises; it is only a limitation on the exclusive and unreasonable use which goes beyond the proper wants of the particular party, and which use I have pointed out cannot be enjoyed without an encroachment on the equal rights

of the surrounding landowners. For these reasons I venture to disagree with what was laid down in *Acton v. Blundell* both as to the nature of property in subterranean waters, and as to the reasonableness of acquiring a right to use them as against the landowner in the way of a servitude upon his land; and it is a great satisfaction to me to think that I am not without authority in this disagreement. In *Broadbent v. Ramsbotham* (25 L. J. Ex. 521), upon that case being named, I find Baron Parke saying 'that case decided that there is no right to a well unless the water has been used twenty years. This Court, and I believe all other courts, disapprove of that part of the judgment which denies the natural right to the water.' And in *Dickinson* and another v. *The Grand Junction Canal Company* (7 Ex. 302), the very point now to be decided came before the Court of Exchequer, and that court decided in favour of the plaintiffs, the owners of ancient mills, and entitled to the use of two streams for working their mills against the defendants, who had abstracted subterranean water which had never reached the streams, but would have done so in its natural course but for the excavation of the well and pumping from it; and although such water was part of the underground watercourse and percolated through the strata, the court held that the abstraction was equally actionable. If in this conflict of authorities we are to decide what is most reasonable to hold, I cannot but think that the conclusion here must be in favour of the plaintiff. He contends only for the preservation of that which he, and those whom he represents, have enjoyed for sixty years and more. He does not desire to deprive the defendant of the reasonable use of any rights, which are incident to him as owner of land, necessary for the enjoyment of any habitation which may be on it for its better cultivation, and which are consistent with the same enjoyment by the surrounding owners of the land. He appeals to the maxims so invaluable to the reconciliation of conflicting rights and of such undoubted authority, *sic utere tuo ut alienum non laedas*. The defendant, on the other hand, maintains that as owner of one piece of land, the law allows him, if he will use the mechanical appliances necessary, to absorb the supply of water of the whole district; every well and pump in every property and messuage in it, however ancient, he may drain dry. He has only to sink his well deeper, and increase the power of his steam-engine, and he may do this and dry up the river at its source, as well as intercept the latent feeders. If the law is so for him, it must be the same for each and all of his neighbours; and his exercise of his so-called right might be put an end to to-morrow by any rival association who would sink deeper than he has done, or use more powerful

engines. It would seem a strange state of the law which sanctions such uncertainty, such conflict, and such disregard of ancient enjoyment, rather than the reasonable and peaceable exercise by all landowners of rights which are only irreconcilable when this unreasonable extremity is introduced. Of course the argument is not affected by the fact that the defendant represents the board of health, and that the vast body of water which he abstracts is to be so distributed beneficially over the whole district. He contends for a principle, which, if established, would sanction all the consequences I have pointed out, which might be applied by any speculative individual or company to divert the water supply of any district to a distant town, or which, in a lesser degree, might enable one manufacturer to ruin another, or destroy the long enjoyed comforts and rights of all his neighbours. I am, therefore, of opinion, that the judgment should be for the plaintiff."

COURSES OF LAW STUDIES.

WITH reference to what is stated at p. 37, we may observe that the law student will derive much useful information from a perusal of the courses of study which have been recommended by eminent lawyers and authors in former times; for though it may not be possible for every one to pursue the courses pointed out, yet each can plainly see that if he would attain to an exact knowledge of the law, he must expect to put his shoulder to the wheel; and we make little doubt, that, by a judicious adaptation of the old to the new authorities, the student will, if at all industrious, obtain a better insight into his profession. We propose to notice, from time to time, some of the recommended courses and works, and commence with Mr. Ritso's, though we can hardly agree with him in one part of his professed aim, which was to run down and unduly depreciate Blackstone's Commentaries. The other part of his design—namely, the recommendation of Coke's Commentary on Littleton—we highly approve. The reader will bear in mind that Mr. Ritso is advising students for the bar, for in his days articulated clerks were not required or supposed to trouble themselves with over-much study; indeed, nothing beyond the mere office routine. But circumstances are greatly changed—first, by the institution of the examinations, demanding an extent of knowledge not merely of practical details, but also of principles, which would puzzle many barristers—especially as the examination is not confined to a single branch of the law; and, secondly, by the establishment of the county courts, which call on the attorney for the display of some of the qualities of an advocate. These circumstances

render the recommendations of former times more suitable to articulated clerks, and, indeed, preferable to any more recent, founded on the notion that the articulated clerk has to pursue quite a different path from that of the student for the bar. It is not, of course, our intention to give the courses entire, but to select such portions as appear to us the most useful to our readers.

Instruction in the office—Pupil reading.—The author, referring to the system of young men entering a barrister's chambers or an attorney's office, says:—"It is far from my intention to presume to insinuate that those professional gentlemen who have pupils under their care, do not do them ample justice; but, independently of the avocations of actual business, by which they are principally occupied, it is not expected of them, according to the prevailing system, that they should give lectures. We must take the general usage as it is, and not build upon those rare instances which are but exceptions to it. Men will not read with their pupils, when they can set them down quietly at the desk to copy precedents: they will not, unsolicited, volunteer the arduous undertaking of developing the science of the law, of explaining the theory of its principles, of demonstrating the results, elucidating the analogies, and, in short, of clearing away each technical difficulty by discussion. How much easier is it to leave the student to the exercise of his own industry, to copy precedents of which no discussion is required, and to read and commonplace Blackstone's Commentaries, which, as far as they go, have need of no explanation! An inexperienced beginner in the profession commences his education under these auspices. Like the good monk who reads his breviary as he finds it, he believes that this is the best of all possible plans to be adopted, and the *ne plus ultra* of professional learning:—

Beyond this flood, a frozen continent
Lies dark and wild, beat with perpetual storms
Of tempest and dire hail!

But this contracted and illiberal notion of the nature of an introduction to the science of the law, has a tendency, among its many other ill consequences, to bring this branch of instruction into discredit and disesteem. It tends to confound the lawyer with the practitioner, the liberal scholar with the mechanic, and, consequently, to render an application to this course of study both an irksome and an endless labour, distasteful to the man of science, and fit for those only whose intention it is to follow the law as a profession.

Law studies inform and enlarge the mind.—It is not in the improvement of the understanding alone that we experience the advantages to be derived

from an extended course of study; it tends to improve the heart equally, and has a visible influence in meliorating and determining the moral character. We insensibly awaken to better feelings, and conceive a livelier and higher sense of all our social and civil duties, from being impressed with the evidences of truth and reason, upon which the knowledge of the science of the law depends. Perhaps the truth of this remark, in which there is neither prejudice nor enthusiasm, may be thus accounted for: in the study of the mathematics, for example, if we take any primary maxim or received truism, as 'that two things which are equal to a third, are equal to each other, or that equals being taken from equals, equals will remain,' the conviction which it produces operates merely upon the intellect, and has no immediate influence upon us in our views of men and things as members of society. But the principles upon which the science of the law depends, are in this respect widely different: the perception for instance, of the degree of civil obligation we are under, 'to live honourably, to do wrong to none, and to render to every man what is due to him' (which are three fundamental maxims [juris præcepta sunt hæc—honestè vivere, alterum non lædere, et suum cuique tribuere. Inst. Civ. Jur. lib. 1, c. 3] in the theory of judicial or legal reasoning), not only enlarges and informs the mind, but tends, at the same time, to meliorate and determine the moral character. In the progress of this interesting investigation, and the resulting conviction to which it leads, of the equitable policy of each decision or rule of law, the student will, therefore, not only have his understanding enlightened and his mind improved, but will infallibly become, at the same time, both a better man and better citizen. I conclude, that the course of study which possesses these peculiar advantages, is rather to be esteemed and attended to, for the purposes of education in general, than all the learning in the world besides. For I regard not the most exalted faculties of the human mind as a gift worthy the Divinity, nor any assistance in the improvement of them as a subject of gratitude to my fellow-creatures, but from a conviction that to inform the understanding corrects and enlarges the heart.

The duty of the law student to be well-grounded in the law.—To the student who intends to follow the practice of the law, there are likewise further considerations to be offered, and such as none ever neglected with impunity. The obligations which are incurred at our own discretion are those of all others of which we are to be the least excused for failing in the observance; and that which was before incumbent upon us, becomes doubly so from being identified with the discharge of a professional duty.

I would ask, then, have we taken any and what steps in order to prepare ourselves to fulfil the duties of this self-created responsibility? Shall we set out, for instance, independently of all systems, and without having any fixed plan before us, relying with the unprofessional and unlearned reader upon the elements of the law, as we find them recapitulated in Blackstone? Or is it the better way, do we imagine, to enter at once upon the technical part, or, as it is sometimes called, the business of the law, expecting to emerge forsooth from the desk to science, and deferring in the meantime the investigation of each difficult or doubtful doctrine, to be ascertained at any future period when we may happen to have occasion for it in practice? This, indeed, would be to plunge into the very error which has been constantly deprecated by all our best and most approved lawyers, and especially by Lord Coke himself, who ceases not to warn and to conjure the student (in those pithy and quaint words which are therefore more likely to impress themselves upon the memory) against the '*præpropera praxis*,' and the '*præpostera lectio*.' From the expectations we are apt to form of our infant talents, and, perhaps, from an eagerness (which is still more natural to us) to meet the expectations of others, we almost insensibly fall into this fatal error; hurrying into the profession as if the practitioner must be of course the lawyer, when, alas! we have hardly yet science enough to discuss an ordinary marriage settlement, or to analyse a common report with accuracy.

Patient reading and reflection.—It is true that experience does not always come with years, neither are grey hairs and a furrowed countenance infallible marks of superior discernment and learning. But there is something so preposterous in the premature confidence of the beardless lawyer, that the very name of the thing alone seems to carry with it an apparent insinuation of ridicule. Do not let us deceive ourselves. Professional instruction is no more to be forestalled, than it is to be dispensed with. It is not the desultory superficial smattering which a man may pick up anywhere or everywhere, but the slow-paced erudition which grows out of much patient reading and reflection. It implies the '*viginti annorum lucubrationes*,'—the results of the study and meditation of a long series of years. To affect to hurry over, with glovenly inconsideration, this vast and profound learning, betrays an entire ignorance both of the nature and principles of it, and is one of the last efforts of indiscretion and puerile vanity. They were lawyers such as these (I ween) that Cicero alludes to in his Oration for Murena, when he says, 'If you provoke me, I will make myself a lawyer in three days,' *Si mihi ste-*

machum moveritis, triduo me jurisconsultum esse profitebor.

Copying precedents — Blackstone's Commentaries — Some errors of Blackstone pointed out.—With respect, indeed, to the system of copying precedents and filling up the marginal references in Blackstone's Commentaries, there is no such apparent defect (it must be allowed) in the quantity of either time or labour which is usually bestowed upon it. The only objection to be found is in the resulting inconvenience, 'that, after having regularly gone through the prescribed probation, the student has still the same irksome and endless prospect before him—the same doubts to perplex—the same difficulties to embarrass.' And here, perhaps, it may be necessary to explain that Blackstone's Commentaries were never intended to be an institute for educating and forming lawyers. On the contrary, if we examine them in this point of view, there can be nothing more circumscribed and incomplete than the information they contain, nor more superficial and uninstitutional than their manner of treating it; and, which is still more distressing to the student, they abound with contradictions and professional errors. Of these, indeed, I am aware that a very large proportion has been already pointed out or corrected in the later editions, and much useful learning has been supplied by the labour of annotation. In the much improved edition of Blackstone's Commentaries, by Mr. Christian, the student will have at least the benefit of being no longer puzzled with those originally mistaken or exploded doctrines, 'that contracts made with a minor are not binding upon a person of full age (B. C. 1, 436); that the daughter of a Jew has not the same claim to maintenance as every other subject (B. C. 1, 449); that there can be no arrest without corporal seizing or touching (B. C. 3, 288); that the horse, which a man is riding at the time, may be distrained and led away to the pound, notwithstanding the rider (B. C. 3, 8); that, under a commission of bankrupt, the landlord shall be allowed his arrears of rent in preference to the other creditors (B. C. 2, 859; see 2 Law Chron. 410); that the right of a donative is for ever destroyed by a presentation (B. C. 2, 23); that an advowson or right of patronage may be conveyed by a verbal grant (B. C. 2, 22); that the principle upon which waifs and estrays are become the property of the Crown is that of their being *bona vacantia* (B. C. 1, 299); that the sole property of all the game in England is vested in the king alone (B. C. 4, 415); and that no persons, of what property or distinction soever, are entitled to kill game, even upon their own estates, without the grant of a franchise' (B. C. 4, 174), and so forth. At the same time, supposing (which is certainly far

from being the case) that the learned editor has not in any single instance overlooked a mistake or misrepresentation of any kind which called for explanation or correction, still (I apprehend) the objections which are here suggested would stand upon the same ground; there would still remain the same substantial argument in support of them. He has industriously repaired, no doubt, and has often illuminated the fabric; but has he placed it upon a wider and deeper basis? Has he extended its dimensions? Has he obviated the inherent inconvenience of a circumscribed and defective accommodation? This, however, is not the principal ground upon which I contend against the propriety of recommending the study of Blackstone's Commentaries as the most advisable method of educating and forming men to be lawyers. They are not the supervenient inaccuracies which are to be remarked in them that I principally object to, but their total misapplication in opposition to what the learned commentator himself designed, to a purpose to which they are in every point of view wholly inadequate. In proceeding to show that this opinion has not been unwarrantably concluded, I shall also expose, as far as I am able, the truly absurd system (by which it has usually been accompanied) of copy-precedents in an office;—a drudgery at which common sense revolts, and which is equally unscientific and unlawyer-like. But I shall beg leave to preface the observations I may have to offer upon this part of my subject by a few introductory remarks upon the nature of the reasoning theory, or common sense of the law; for if it were not from some strange misunderstanding in this particular, there would not, I apprehend, be the occasion which there now is to say anything in its vindication. That the means of acquiring may be fairly estimated, let us first understand each other with respect to the quality of the thing to be acquired.

Common law, meaning of [2 Law Chron. 6, 210, 236].—In the first place, then, it is to be premised that the groundwork of our whole system of civil or municipal jurisprudence is that which we usually call, in one word, 'the common law,' and which implies both the written statutes of the realm, and the unwritten received customs and usages together—the *lex scripta et non scripta*; and it is, therefore, indifferently called 'common law,' or 'common right'—*lex communis*, or *jus commune*—being common to every man without any particular act or reservation of his own (Co. Litt. 142, a.). The 'common law' has divers meanings. In its proper or technical sense, it signifies the laws of this realm as they have been immemorially received and holden for such, without the intervention of any particular statute to enforce them. Thus we say, 'the tenant

for life or years was not punishable for waste at the common law before the statute of Gloucester; but the tenant by the curtesy and tenant in dower were punishable for waste by the common law—that is, by the usage and custom of the realm—before the said statute of Gloucester was enacted' (Co. Litt. 58, b.). And the reason for the above distinction was, that tenant for life and tenant for years were always supposed to have their estates by the act of the parties themselves, whose business it was to take care to provide specially against waste; but tenant by the curtesy and tenant in dower had their estates by the operation of the law, and not by the act of the parties; and, therefore, the law supplied the provision against waste in those cases, in favour of the reversioner, which is in conformity to that ancient maxim—*lex nemini facit injuriam*. Another sense again, in which we sometimes speak of the common law, is, in contradistinction to the canon or civil law; as when the question is, whether any matter shall be tried or determined according to the course of the common law, or by the rules of the ecclesiastical or civil law courts. And sometimes, again, we intend by it the jurisdiction of the king's courts in contradistinction to the base or customary courts of courts baron, county courts, pie-powder, &c.; as when a plea of land is removed out of ancient demesne, because the land is freehold, and therefore pleadable at the common law—that is, in the king's courts of K. B. and C. B., and not in ancient demesne, or in any base court.

Law a practical science.—There is no doubt that the knowledge of the theory of the law must be afterwards perfected by practice; for the law is not a speculative but a practical science. But, even in this point of view, it becomes us, in the first instance, to apply ourselves to learn the arguments and the reasons of the law, in order to be prepared by it to understand the principles upon which practice is grounded. Lord Coke distinctly and repeatedly tells us that 'the law, say the common law itself, is nothing else but reason;' that 'it implies that perfection of reason whereunto a man attains by long study, often conference, long experience, and continual observation;' and, lastly, that 'we must, therefore, diligently apply ourselves (avoiding those enemies to learning, the *præpropæra praxis et præpostera lectio*), to a timely and orderly course of reading, that, by searching into the arguments and reasons of the law, we may so bring them home to our natural reason, that we may perfectly understand them as our own.' This is in substance the uniform tenor of Lord Coke's advice and injunction to students; and what more useful branch of human instruction is there, or at once more interesting, more edifying, or more delightful to a man of liberal

and improved mind, than thus scientifically to investigate the local constitutions of his native land, by deducing them, by necessary consequences, from those incontestible principles of plain reason and common intendment upon which they were originally framed or adopted! *Non enim à Prætoris edicto neque ex duodecim tabulis, sed penitus ex intimâ philosophiâ hauriendam juris disciplinam puto. Qui aliter jus tradunt, non tam justitiâ quam litigandi vias tradunt* (Cic. de Leg. lib. 1).

Common sense of the law—Descents—Debts—Feudal system.—But there are some who have imagined a sort of distinction, in the exposition of the theory of the law, between artificial reasoning and that of common sense; as if every proposition which partakes of a more artificial construction, and which consequently requires a more elaborate method of proof in the illustration of it, can therefore no longer be said, with propriety, to be common sense; or, in other words, as if the idea of common sense were in this instance necessarily to be confined to those objects of science alone which are self-evident. The philosophy of the reason, or common sense of the law, for which we are here contending, is not always (as Lord Coke expresses it) to be understood of every unlearned man's reason, but of that which is warranted by authority of law; or, as he describes it in another place, it is to be understood of an artificial perfection of reason, acquired by *long study, observation, and experience*; but which, after all, amounts to no more than the same kind of general preparation, which is necessarily required from us in the pursuit of every other equally scientific object or investigation whatever? The advancement of knowledge has this condition inseparably attached to it,—

'The man who reads, and to his reading brings not
A spirit and judgment equal or superior,
Uncertain and unsettled still remains.'

Perhaps an example or two may serve to place this matter in a clearer light: 'Every proposition is said to be demonstrable in its nature, when the mind can certainly perceive the agreement or disagreement of the ideas of which it consists, whether immediately, as in the case of intuitive perception, or through the medium of those intervening ideas which are called proofs.' Now there is, generally speaking, this perceivable agreement or disagreement to be found in all our common-law doctrines; that is to say, so far as they are capable of being put into general propositions, however difficult those propositions may be to the unprepared reader, or how artificial soever in their construction. Let us take, for example, the three following old rules or maxims:—1st, 'that the father shall not be heir to the son' (2 Chron. 10; 3 Id. 248); 2nd, 'that lands

descended or devised, shall not be charged with the simple contract debts of the ancestor or deviser (3 Chron. 8, 9), although the money may have been laid out in the purchase of those very lands; and 3rd, 'that lands shall rather descend to a remote relation of the whole blood, or even escheat to the lord, in preference to the owner's half-brother' (3 Chron. 248). We have here then, three distinct propositions, in which, upon the first view of them, there is nothing like plain reason and common sense to be discovered, without the help of those intervening ideas from which we learn, first, that, under the *feudal system* (as it formerly subsisted in this kingdom, till about the middle of the 17th century; see 2 Chron. 69), there were certain personal *military services* to be performed, as the price or condition upon which all lands were held, and to which, therefore, the father, from his more advanced age, was reasonably supposed to be less competent; and, secondly, that it was equally matter of policy, during the same period, that the freeholder, by whom the feudal services were to be performed, should not be distracted, by civil suits, from the discharge of so important a duty; and, thirdly, that the right of succession of the whole blood was only admitted upon questions of adjudication of title, as a mere *rule of evidence* to supply the frequent impossibility of proving a descent from the first purchaser, without which (according to a fundamental maxim of our law) no inheritance was ever allowed, and, consequently, that this was an indulgence to which the demi-kindred could have no reasonable pretension; the descendants of one ancestor being much less likely to be in the direct line of the purchasing ancestor, than those who are descended from the same couple of ancestors. And what, then, do I mean to conclude from hence? I answer, that the occasion of the difficulty (if any) which occurs in the foregoing propositions, arises from a want of due knowledge in ourselves, of the extent to which the principles of the feudal polity have been engrafted into our established system of remedial jurisprudence, and the consequent distinction which the common law has taken between *feudal* and *commercial*, with respect to the descent or alienation of real or landed property.

Words of inheritance in conveyances and wills—Livery of seisin.—Every alienation or conveyance of landed property which is originally of a 'feudal' nature, is in a legal sense to be construed *stricti juris*; but where the conveyance is originally 'commercial' in its nature, it is to be construed liberally. As for example: in conveyances at the common law, by deed, the insertion of the word *heirs* is necessary, in order to pass the inheritance to a purchaser; but there never was any such formality required in the case of a devise (Co. Litt. 9 b.; 1 Chron. 51); the

reason of this distinction is as follows:—Upon the introduction of the feudal tenures into England, in the reign of William the Norman, it became a settled maxim or rule of law, 'that the ultimate reversion of all the landed property in the kingdom vested in the king.' Having assented to this fundamental feudal constitution as the basis of military discipline, our ancestors obliged themselves, by an oath of fealty, to hold their lands of him as their original proprietor, and to do the same homage for them (in support of his title and in defence of his territory), as if they had really received them from his bounty. Afterwards, subordinate infeudations began to be granted out upon the same principle: the tenant became the vassal of the lord of whom he held his estate; and his personal services, when called upon, were made the condition or consideration of the tenure. We have here, then, the original meaning of the word *fee*, *feud*, or *fief*, which was indifferently given to those estates, not as at this day, in reference to their duration or quantity, but to denote their stipendiary or feudal quality; and, as the consideration upon which the estate was granted was personal (the personal ability of the feudatory to serve in war), the presumption, therefore, naturally arose, that the grant was intended to be confined to the lifetime of the grantee alone, where it was not expressly declared otherwise. By the same rule, then, if A. grants an estate by deed, that is to say by deed of livery of seisin, to B. 'in fee,' or to B. 'for ever,' or to B. 'and his assigns for ever,' it follows, that, in all these cases, B. shall take an estate for life only, and not the inheritance, because of the want of the word *heirs*. [But if the grant were for a valuable consideration, a court of equity would reform the conveyance according to the contract and intention of the parties.] For conveyances, by deed, derive their whole effect from the public act or deed of delivering seisin or corporal possession of the land, which, in substance, is no other than the original feudal ceremony of investiture; and, therefore, the form of the conveyance being feudal, the principles of its construction are held to be equally so. *Modus dat legem donationi* (2 Chron. 70). The Statute of Frauds enacts, that, in all such cases, there must now be a deed in writing; but this has made no alteration in the construction of these conveyances. It is still by the deed 'of livery of seisin' the land passes, and not by the deed 'in writing.' The nature of the conveyance is not altered; *non quod scriptum est sed quod factum est inspicitur*. And this is the reason why the livery is usually endorsed, together with the names of the witnesses, upon the back of the deed; for the land passes by the livery, and without it the feoffee has only an estate at will (Co. Litt. 48 a., *ibid.* 52 b.)

[But livery is not now requisite as the immediate freehold of land lies in grant (8 & 9 Vic. c. 106, s. 2; 2 Chron. 70). The old rule should be remembered—viz., that where livery of seisin was required, the word 'heirs' was necessary to create a fee].

Devises and uses—How construed.—But why, then, do we not adhere to the same principles in the construction of conveyances by devise? We have seen that a feoffment, at the common law, by deed, is of no avail, without the specific act or ceremony of livery of seisin; and this was, during the feudal times, for two reasons: first, that it might appear against whom the præcipe was to be brought, in the case of a disputed title; and, secondly, that the lord might run no risk of being defrauded of his fines and services. But, it is evident, that these reasons did not apply where there was no livery, as in the case of uses for instance; for, the use being granted distinct from the possession, no fines or services could attach to it, neither was the cestui qui use liable to the præcipe in the case of a disputed title. Now, if we apply the same reasoning to limitations by devise, we shall find them to be precisely within the same exception; for, not taking effect till after the decease of the testator, they can enure no otherwise than by way of declaration of the use, to which the seisin is afterwards silently executed by the statute (27 H. 8, c. 10) of uses (see hereon, 3 Chron. 242; Burt. pl. 280, 281; Hay. Conv. 51, 4th edit.). Therefore, because these devised estates are in their nature analogous to uses, and not to feoffments, they are allowed to operate as uses, and are reviewed with the same latitude of construction. Accordingly, if A. devises to B. for ever, or to B. and his assigns for ever, B. shall take the inheritance or fee simple, though the word 'heirs' was not mentioned; for the word forever is a word of perpetuity, and sufficiently ascertains the testator's meaning; and the legal strictness, arising from the feudal rules and maxims with respect to feoffments, is not to be regarded in this instance, for the reasons already mentioned. [A devise passes a fee unless a contrary intention appears by the Will. 1 Vic. c. 26, s. 28; 1 Chron. 51].

Uses, origin and effect of—Trusts—Use upon use.—Uses were the invention of very early times, from motives of fraud, fear, or convenience. First, of fraud: as, if A. having an infant son B. made a feoffment to C. to the use of B.; upon A.'s death the lord was defrauded of those grand fruits of military tenure, wardship, and marriage; and, if A. died without heir, the lord was further defrauded of his escheat. Again, where a tenant had a defective title, he had only to infeoff another to his use; and if, afterwards, a *præcipe quod reddat* was brought against him, he could plead *non tenet*; for the præ-

cipe lay only against the actual tenant of the freehold, till the statute 1 H. 7, c. 1, which gave it against the pignor of the profits. It was thus, too, the statutes of mortmain were used to be avoided by infeoffing trustees to the use of the convent, when infeoffing the convent would have been a forfeiture. Secondly, of fear; and not only the fear of being impleaded in a real action, but also the fear of confiscation, which was always a very powerful motive in those troublesome times, when attainders were so frequent (see Co. Litt. 272, a.). Thirdly, of convenience; for, by infeoffing to uses, they made their estates mouldable to the various purposes of raising portions for younger children, of creating contingent remainders, of limiting future or springing uses, and of devising by will, which, by the common law, they could not do, but only in certain places by the custom. Adapted to these various considerations, limitations by way of use were beginning to be generally resorted to through the kingdom, when Henry 8, from the idea of his being thus defrauded (as he called it) of his feudal services, prevailed upon his Parliament to pass the statute of uses (27 H. 8, c. 10) which enacts, that the seisin shall be executed to the use, by the mere operation of law, thereby making the seisin and the use convertible terms. It is, however, to be observed, that this has introduced no other material change in conveyancing than the addition of a trust, or, as Lord Hardwicke emphatically expresses it, just three words more. For, instead of A. infeoffing C. as formerly, to the use of B., &c., he now infeoffs C. to the use of him and his heirs in trust for B.; and the statute having once operated to convey the legal estate from A. to C. its operation is held to be spent, so that it cannot operate a second time (see the note, 281, to Co. Litt. 271, b.; 3 Chron. 166, 167; 1 Id. pp. 52, 437).

Rent—When heir.—Again, let us take the well-known rule of law respecting the reservation of rent,—that 'rent reserved upon a lease derived out of a freehold, though reserved by the lessor to himself and his executors, shall go upon his decease to his heir, and not to his executor; and so *converso*, if the lease upon which the rent has been reserved was derived out of a chattel, the executor shall have it, and not the heir, notwithstanding the lessor may have expressly reserved it to himself and his heirs, and not to himself and his executors' (Co. Litt. 47, a.). The distinction which the common law takes between feudal and commercial, with respect to the descent or alienation of real or landed property, has been attempted to be elucidated in the foregoing proposition, as it concerns the form of the conveyance. We have, in the present instance, to consider it as it applies to the quality of the estate.

Feuds—Descents.—It has been already remarked;

that the constitution of feudal tenure was introduced into this kingdom, and became a part of the common law of landed property, at a very early period of our history (2 Chron. 69). By the rules of succession, as they were consequently then framed upon feudal principles, the descent of lands was restricted, by the course of the common law, to those alone who were of the blood of the feudatory or first purchaser. It was presumed, that the fidelity of the ancestor would survive in his descendants, and be hereditary in his family; and, perhaps, too, that he might naturally transmit to his posterity his personal ability to serve in war, which was the principal condition of feudal tenure in general.

Tenant of the freehold—Reversion and rent go together.—An estate thus constituted, and which could no otherwise be created than by the feudal ceremony of investiture, or public and solemn act of livery of seisin, was denominated a freehold, and he who had this species of seisin, which was always for life at least, was called the tenant; a term which appears to have been then used, not as at this day, to signify indifferently the tenant in possession, whether tenant for life or years, but to denote the proper tenant of the freehold, who was likewise tenant to the præcipe, and the ostensible person to whom the lord was to look for the discharge of his fines and services. Let us suppose, then, that such tenant of the freehold makes a lease for years, reserving rent to himself and his executors, and dies: now, by the course of the common law, the reversion descends to the heir and not to the executor; but if the executor could claim the rent, distinct from the reversion, then would the rent go in one direction, and the reversion in another; which would be creating a double tenure, contrary to the statute (18 Ed. 1) of subinfeudations. Inasmuch then, as the heir is entitled to the reversion by descent, so also shall he have the rent as an incident thereto; for we have seen that the reversion and the rent cannot go in different directions; and, therefore, the law says, the reversion, which is the principal, shall draw after it the rent, which is but the incident. The maxim is, *accessorium sequitur suum principale, non ducit* (Noy's Max. 90, 202; Co. Litt. 52, a.).

Chattels real go to the executor—Covenants in leases—Assent to bequest.—On the other hand, estates which were less than freehold, as leases for years of every description, and which even to this day come under the general denomination of chattels, were considered, under the feudal system, to be of little or no value; their tenure being of that precarious nature, that, till the 21st of Henry 8, the freeholder had the power of defeating them, at any time, by a common recovery. (The termor could not falsify a

covinous recovery of the freehold before the stat. 21 H. 1, c. 16, because he could not have the thing to be recovered. Co. Litt. 46, a.). And, because these inferior tenants were not considered to have any property of their own in the land, but only an interest in the estate, as the bailiffs or farmers of the freeholder, their interest was allowed to vest upon their decease in their executors, like the stock upon the farm, and other personal goods and chattels in general; the heir having no more to do with these, than the executor has with the freehold. It is for this reason that the covenants in leases are required to be made with the heirs and assigns of the lessor, where he is himself the owner of the inheritance; but where he is only the lessee of the proprietor of the estate, then with his executors and administrators. For the same reason, where a term for years is devised, the devisee cannot enter without the consent of the executor. For the devisee, in that case, takes as legatee of a chattel, out of which the executor is bound to see that all the debts are paid before the legacies: the default of which would be a devastavit, and make him liable *de bonis propriis*. But with the freehold, the executor has no right to intermeddle, *causa qua supra* (Co. Litt. 111, a.; Ibid. 388, a.; 2 Chron. 67, 86). By the same rule, then, as the reversion expectant upon the determination of a lease derived out of a chattel, shall go as a chattel to the executor, in exclusion of the heir, so likewise shall the reserved rent (if any) as an incident thereto; and no stipulation to the contrary can give it a different direction; for a condition which contravenes a settled maxim or rule of law, is of no effect, and ought to be rejected (Co. Litt. 206, b.; Noy's Max. 57)."

SUMMARY OF DECISIONS.

CONVEYANCING AND EQUITY.

ALIEN.—*Devise of real estate in trust for—Trust enforced for crown.*—A devise of real estate to trustees in trust for an alien is not void, and the Court of Chancery will enforce the execution of the trust for the benefit of the Crown. *Rittson v. Stordy* (1 Jur. N. S. 771) not followed. *Barrow v. Wadkin*, 3 Jur. N. S. 679; 29 Law Tim. Rep. 320.

ASSETS.—*Administration of—Priorities—Executor—Claim by a creditor to retain money in payment in priority disallowed—Set-off.*—An executor has a recognised right to be paid any sum which may be due to him out of the assets of his testator, in priority over any other creditor; but where a creditor claims to retain assets come to his hands in liquidation of his debt, he must show, in a case where the assets are not enough to pay all the other creditors, that his right stands higher than the other creditors.

There is no express authority for the proposition that a creditor can retain assets upon the same footing as an executor. There are, indeed, some expressions in the case of *Cherry v. Boulton* (4 Myl. and Cr. 442) which seem to go to this, that a creditor can retain money, and appropriate it in payment of his debt; but that was not expressly so decided. On the other hand, Lord Eldon, in *Ex parte Blagden* (19 Ves. 465), would not permit a creditor of a bankrupt to set-off a debt which the bankrupt owed against a debt in which the creditor became indebted to the assignees of the bankrupt in right of the bankrupt, subsequently to the commission. In fact, as Lord Hardwicke said, a creditor cannot, unless under peculiar circumstances, prevail against the right of the other creditors to have the assets distributed equally. L., at the time of his decease, was indebted to H., to whom and another he had assigned a policy of insurance, the proceeds of which were received by H., and in part applied in liquidation of his debt. In administering the estate of L., which was insolvent, H. claimed to retain the money which he had received, but the chief clerk refused to allow the claim. On application to vary the chief clerk's certificate, the court declared that the sum received by H., and applied in liquidation of his debt, was assets for the benefit of all the creditors. *Beyer v. Adams, in re Law*, 3 Jur. N. S. 710.

CHARITIES.—*Amalgamation—Private founder—Queen's charter—Variation by decree—Jurisdiction.*—Although the governors of a private charity are incorporated by royal letters patent, and are empowered to make rules and regulations for its management, still the Court of Chancery has jurisdiction, and will direct a scheme for the future management of the charity, and will include in the scheme divers other charity estates, some of which were given for purposes wholly different from those of the incorporated charity. *The Attorney-General v. The Governors of the free Grammar School in Dedham*, 26 Law Journ. Ch. 497; 3 Law Chron. 367, 368.

CHARITABLE LEGACIES [vol. 1, p. 261; vol. 8, p. 124].—*Pure personalty—Liability to debts.*—The rule respecting the application of a testator's estate to the payment of legacies for charitable purposes, and which are directed to be paid out of the pure personalty, was considered in *Robinson v. Geldard* (3 Mac. and G. 735), and the rule there laid down is said to be founded on extreme good sense. In that case the testator gave large charitable legacies, which he directed should be paid out of that part of his personal estate not savouring of realty; and the pure personalty which remained after payment of debts and funeral and testamentary

expenses, was sufficient to pay the charitable legacies in full, if no part of the other legacies were taken out of it, but insufficient if the pure personalty were to contribute to the general legacies. Lord Truro held, that the pure personalty was not to contribute to the other legacies. There was sufficient for each class of legacies, and the question did not arise as to what would have been done had the other fund not been sufficient for the general legacies; but Lord Truro considered that the direction in the will meant, that pure personalty was to be applied primarily in payment of the charitable legacies; he did not say that the gift out of the pure personalty was a demonstrative legacy, but only that the charity legacies were demonstrative or analogous thereto. Then comes the question, what is the personal property which is, by law, applicable to charitable purposes? The answer is, so much of the pure personal estate as remains after contributing *rateably* to the payment of debts, funeral and testamentary expenses, and costs. Such, at least, was the decision of the Lords Justices in the following case. A testatrix, after bequeathing certain specific and pecuniary legacies, gave several pecuniary legacies to charities, and directed that the charitable bequests should be paid, in precedence of the other pecuniary legacies, out of such part of her personal property not specifically bequeathed as was, by law, applicable for charitable purposes. The pure personal estate was insufficient to pay the charity legacies; but the other personal estate was sufficient to pay the other legacies and debts, &c.: Held, reversing the decision of one of the Vice-Chancellors, that the pure personal estate must, before being applied to the satisfaction of the charitable legacies, contribute, with the other portion of the personalty, to the payment of the debts, funeral and testamentary expenses, and costs. *Tempest v. Tempest*, 26 Law Journ. Ch. 501.

DEVISE.—*Maintenance—Bequest to wife for maintenance of herself and children—Condition.*—A testator, who was an hotel-keeper, bequeathed all his property to trustees. One of the trusts was to permit and suffer his wife to carry on the business of the hotel so long as the same could be conducted with profit and advantage to his estate, and to permit his said wife to have and receive the profits arising from the said business, so that she might apply the same in the maintenance of herself and her family, and the education of her children. The widow eloped with a married man, and the business was carried on under the direction of the court: Held, upon the whole will, that there was an implied condition that the widow should be a fit person to carry on the business, and for the care and education of her children, and that she had by her conduct put her-

self out of the trust, but that she was entitled to maintenance. *Castle v. Castle*, 3 Jur. N. S. 723.

ELECTION [vol. 2, pp. 27, 195, 200].—*Dower—Direction to sell—Part of proceeds given to wife.*—The doctrine of the Court of Chancery is, that if there be anything in a will inconsistent with the common law right of the testator's widow to have her dower set out by metes and bounds, there she shall be put to her election, otherwise not (*Birmingham v. Kirwan*, 2 Sch. and L. 444). Different judges, however, have come to different conclusions as to what is inconsistent. In *Dickson v. Robinson* (Jac. 503) the court thought that where there was a direction to sell, and divide the property among certain parties, that was inconsistent with the widow taking by metes and bounds. In the following case there was nothing to defeat the widow's rights, except a simple direction to sell; and whatever difficulty may have arisen on a power of leasing (and it seems now agreed that such a power is inconsistent with the wife's right of dower), there is a great difference between that case and a power of sale. As to a sale, indeed, it is every day's practice to have lands sold subject to the right of the widow to dower. In *Hall v. Hill* (1 Dru. and W. 94), Lord St. Leonards expressly limits himself to the case of a power to demise, and saw no such inconsistency in the existence of a power of sale. And in *Ellis v. Lewis* (3 Hare, 810), Sir J. Wigram remarked to the same effect, that he had met no case where a simple power of sale had been held to show such inconsistency with the right of the widow to dower; and he goes on further to say, that if the direction for sale creates no such inconsistency, he did not see how any direction as to the distribution of the money could make a difference. In accordance with these authorities it has been held that a direction to sell realty contained in a will, is not in itself alone inconsistent with the intention that the widow should have her dower, as a power to demise would be. A testator gave all his household furniture and effects in his house to his wife; a pecuniary legacy, debts, &c., to be paid out of the general personalty; all his real estates to be sold by auction, and the one-half of the whole personalty, and of the proceeds of the realty to his wife, and one-fourth to a nephew, and one-fourth to a niece: Held, that the widow was not bound to elect between her dower and the benefits given her by the will. *Bending v. Bending*, 26 Law Journ. Ch. 469; 3 Jur. N. S. p. 535; ante, p. 43.

EXECUTOR.—*Carrying on testator's trade—Joint stock companies—Shares remaining in the name of executor of deceased shareholder—Rights of creditors.*—The following case as to the personal liability of an executor continuing the trade or to hold the shares

of his testator is of importance:—The executor of a trader carrying on the trade after his death, though doing so avowedly in the character of executor, is nevertheless *personally* liable for all the debts contracted in the trade after his death, whether he is entitled or not entitled to be wholly, or to any extent indemnified by the testator's personal estate, and whether it is sufficient or insufficient for the purpose; nor does the propriety of his conduct, as between himself and those beneficially interested in the testator's personal estate, give the creditors of the trade becoming so after the death the rights of creditors of the testator; it being immaterial also, as far as they are concerned, whether the testator, if he had a partner, was bound by a covenant with him, that the testator's executors should continue the trade in partnership with the surviving partner (see *Exp. Garland*, 10 Ves. 110; *Exp. Richardson*, 3 Madd. 138). Upon the principles thus stated, it was decided that the executor of a deceased shareholder in a joint-stock company is not liable to make good out of the assets of his testator to the creditors of the company, debts contracted subsequently to the testator's death, though continuing to hold the shares and receive the dividends in his character of executor. *Labouchere v. Tupper*, 5 Week. Rep. 797.

FEME COVERT.—*Wife's chose in action—Reduction into possession—Equity to settlement* [vol. 3, pp. 39, 121, 282].—It has long been established that where a reversionary legacy is given for the benefit of a married woman, an assignment of it by the husband and wife will not operate at all against the wife surviving; but when the legacy comes into possession during the wife's life, the assignment operates as an assignment by the husband and wife just as if it had been made after the death of the tenant for life. The effect of an assignment by the husband of the wife's legacy, payable *in presenti*, is no doubt to put the assignee in the place of the husband, and, consequently, if payment be made to the assignee, it is good whether the assignment be by way of mortgage, or absolute; if the assignment be absolute, the assignee takes it absolutely; if by way of mortgage, he takes it subject to redemption. An estate was devised to A. B. for life, with remainder to C. D. in tail, charged with £200 payable to E. F., a married woman, on the death of A. B. During the life, A. B., E. F., and her husband, assigned this legacy to her father as a security for £200 then advanced by him to the husband; but the assignment contained no covenant to pay, or proviso for redemption. The father died, leaving C. D. his executor and sole residuary legatee, and he paid, on account of the father's debts, a larger amount than the personal estate he received. A. B. died, leaving the husband

surviving, and thereupon C. D. came into possession of the estate; E. F. instituted a suit to have the legacy settled upon her and her children, but it was held (reversing the decision of one of the Vice-Chancellors), that the legacy had been reduced into possession, and, therefore, that she was not entitled to a settlement. *Allday v. Fletcher*, 26 Law Journ. Ch. 519.

INJUNCTION.—*Restraining divulgement of facts pursuant to agreement.*—Publication of facts contrary to agreement will be restrained, although occasioned by a very small difference in money arrangements. *Anon*, 3 Jur. N. S. 685.

LANDLORD AND TENANT.—*Ejectment—Breach of covenants—Equitable relief.*—The particulars of the following case will be found *ante*, pp. 44, 45. A court of equity will not interfere generally to restrain an action of ejectment brought against a lessee for breaches of covenant in the lease, except for breach in non-payment of rent. Where a lessee covenanted to make certain drains, it is no equitable ground of interference that he employed persons to make the drains, but that they did not do the work properly. *Nokes v. Gibbon*, 3 Jur. N. S. 726; *ante*, 44, 45.

LUNACY.—*What acts of lunatic valid—Inquisition—Creditor's right to traverse—Issue.*—The result of the authorities as to what acts of a lunatic will be held valid seems to be, "that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him upon the faith of his being a person of competent understanding." A person who was tenant in tail of copyhold estates was by inquisition found lunatic in 1852, and the lunacy was dated back to the 1st May, 1846. The lunatic subsequently obtained permission to traverse the inquisition, but died without having done so. It turned out that in the year 1847 the lunatic had executed deeds (not pursuant to contract with third parties) appointing an attorney to surrender the copyhold to issues, so as to enlarge her estate tail into a fee simple, and the surrender was made accordingly. Upon a claim by a simple contract creditor to make this copyhold property liable: Held (reversing the decision of Sir J. Stuart, V. C.), that the entail was not effectually barred, there being no analogy to the old doctrine that fines and recoveries were good although made by a lunatic, which depended on a fiction, a deed barring an entail being now open to every objection that might be taken to any other deed. The *prima facie* evidence of insanity afforded by the finding of the inquisition having been in part rebutted by the leave to traverse: Held, that the creditor had a right to an issue to try the question of the lunatic's sanity on the day on

which she executed the disentailing deed. *Elliott v. Ince*, 3 Jur. N. S. 597.

LUNACY [vol. 3, p. 396].—*Commission—Principle on which court orders an inquisition—Protection of party's person and property—Primary objects.*—In the following case, the Lords Justices laid it down as a rule that the court, upon a petition praying that a commission may issue to inquire into the state of mind of a person alleged to be a lunatic, does not merely consider the medical evidence to ascertain whether the irregularities and defects do, or do not, amount to insanity, but is governed by a regard to the wellbeing and happiness of the lunatic, and the condition and security of his property. In other words, it is the first duty and object of the court to see whether it will be for the benefit of the alleged lunatic that a commission should issue. Where there is any doubt, the court, before ordering a commission to issue, will direct further inquiry into the circumstances, with a view to sparing the alleged lunatic vexation and expense. *Re Hoblyn, ex p. Peter*, 29 Law Tim. Rep. 305.

PARENT AND CHILD.—*Maintenance, education, and support—Father's right to be re-couped out of child's income.*—Trustees were directed to receive the income of a fund of £1,000, and pay and apply the same for the benefit, maintenance, and education of the children of the marriage, and to pay and divide the fund, and all accumulations thereof, among the children, at twenty-one. There was no express direction to accumulate. The father wholly maintained the children, six in number, for ten years, at a much larger expense than the income of the fund: Held, that he was entitled to receive the accumulations of income for the past time, and the future income during the infancy of his children. *Birch v. Sumner*, 3 Jur. N. S. 712.

POWER.—*Trust—Charity—Uncertainty.*—The following distinctions as to trusts and also as to gifts being void or not for uncertainty of persons and objects are worth consideration. Where a fund is given to A. to be by him employed at his discretion upon certain objects, a trust in favour of those objects, and not a mere power, is created. Where a fund is given to A. to be applied for the benefit of B. or C. as A. shall think fit, and A. does not make any appointment, the bequest is void for uncertainty. Where a fund is given to A. to apply part for B. and part for C. as he shall think fit, and A. does not make any appointment, B. and C. shall be declared to be entitled in equal shares. By will dated 1837, the testator gave £2,000, part of the money to be received on certain policies, to his wife absolutely, and the surplus to her for life; and on her decease, to be divided, one moiety thereof to A., the other moiety to be at the disposal of the widow of the

testator, "to apply a part to the foundation of a charity school, or such other charitable endowment for the poor of O. as she may prefer, and the remainder of such moiety to be at her disposal among any relatives, in such proportions as she may please to direct." The widow died without exercising the direction given to her either in favour of any charity or in favour of any relatives: Held, first, that the intention in favour of a charity was well expressed. Secondly, that the widow might have given to any of the relatives of the testator, and not merely to his next of kin according to the statutes, any sum she thought proper. Thirdly, that having made no appointment one-half of the moiety thus placed at her discretion was impressed with a charitable trust, and a scheme ought to be directed accordingly, and the other moiety belonged to the next of kin of the testator according to the statutes exclusively of other relatives. *Salisbury v. Denton*, 3 Jur. N. S. 740.

PUBLIC COMPANY.—*Railway company*—*Railway Clauses Consolidation Act*, 1845, s. 92 [stated *ante*, p. 21]—*Part of building*—*Meaning of word "house"* [*ante*, p. 21].—The decision of V. C. Wood, in *Grosvenor v. Hampstead Railway Company*, *ante*, p. 21, has been overruled by the Lords Justices, they holding that the piece of land upon which one of the proposed wings of the building was to be erected was included in the term "house" in the 92nd section of the above act, and that, therefore, the court could not take the piece of land without taking the whole land and edifice. *Grosvenor v. Hampstead Junction Railway Company*, 5 Week. Rep. 812; 29 Law Tim. Rep. 819.

PUBLIC COMPANY.—*Winding-up of joint-stock company* [vol. 3, pp. 175, 177; *ante*, pp. 61, 63]. *Shareholders*—*Contributory*—*Fraudulent representation* [vol. 3, p. 151].—The Lord Chancellor in Ireland has decided that shareholders who were induced to take shares in a joint-stock company by means of fraudulent misrepresentation by the manager of the affairs and condition of the company, are not liable as contributories, under the Winding-up Act. *Exp. Ginger*, 29 Law Tim. Rep. 816.

PUBLIC COMPANY.—*Winding-up Act*—*Building society*.—A benefit building society, under the usual rules, duly certified, is within the operation of the Winding-up Act. *Re The St. George's Benefit Building Society*, 3 Jur. N. S. 688.

PUBLIC COMPANY.—*Joint-Stock Bank*—*Contributories*—*Executors of deceased owner of shares*—*Sale of shares incomplete; no recognition by company*.—Where, as between a joint-stock banking company and the purchasers of shares in it, the company have done no act to assent to or recognise the sale, and have not treated the purchasers as shareholders, the mere delivery to the broker's clerk of the blank

forms of transfer for the purposes of being filled in and executed does not operate as such assent or recognition. Upon this principle, therefore, the executors of a deceased shareholder in a joint-stock bank who sold the shares of their testator through the medium of a broker, but in effecting the sale the requisitions of the company's deed were not complied with, were, as between themselves and the other shareholders, held liable as contributories, but without prejudice to any question that may exist as between the executors and the parties to whom the transfers were made or intended to be made. *Re Royal British Bank*, 29 Law Tim. Rep. 822.

TRUST.—*Transfer of funds by parent into names of herself and infant children*—*Retransfer by infants as trustees*.—An investment by a parent in the name of herself and children, is not necessarily for the benefit of the children. E. S. transferred a sum of stock into the names of her three infant children jointly with her own, but not as a gift or provision for them, nor with the intention, in any way, to deprive herself of the ownership thereof, or the benefit of the same, but solely to prevent another party obtaining the same. On the bill filed by E. S., the court declared that the three infant children were trustees jointly with the plaintiff, in trust for the plaintiff, and that the plaintiff was absolutely entitled to the fund. *Stone v. Stone*, 3 Jur. N. S. 708.

TRUSTEES.—*Trustees Relief Act*, 10 & 11 Vic. c. 96 [vol. 3, pp. 184, 286, 317].—*Misconduct in payment of money into court by trustees*—*Costs ordered to be paid by the trustees*.—It has been decided by the Lord Chancellor and the Lords Justices that, notwithstanding doubts to the contrary, the Court of Chancery has jurisdiction to order trustees who have improperly paid money into court under the Trustees Relief Acts, to pay personally the cost of that proceeding. Trustees had paid money into court under such circumstances, that the court considered that they had thereby acted oppressively. The trustees had deducted from the money paid in a sum in respect of their costs. Upon a petition, by the *cestuis que trust*, that the money paid in might be paid out to them, that the trustees might refund the amount retained, and that the trustees might pay the costs of the petition, the Master of the Rolls made an order in accordance with its prayer. On appeal to the Lord Chancellor and Lords Justices, they held the payment in to be an act of oppression, and directed that the trustees should pay the costs; the appeal of the trustees from the decision of the Master of the Rolls was dismissed, with costs. *Re Woodburn's Trusts*, 26 Law Journ. Ch. 522.

WAGERS.—8 & 9 Vic. c. 109, s. 18.—*Claim by the winner of a wager paid to an agent disallowed.*—

The 18th section of statute 8 & 9 Vic. c. 109, enacts, "that all contracts and agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void, and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made" (8 Chron. 157). In administering the estate of a testator in the cause, J. A. claimed to be paid a sum of money which had been won by the testator on a wager made by him at the request of J. A. The money won on J. A.'s account was, as alleged, paid to the testator some time prior to his decease. The chief clerk disallowed the claim. On application to vary the certificate, the court held that the language of statute 8 & 9 Vic. c. 109, s. 18, was express, that no action or suit should be brought for recovering any sum of money won upon any wager, and that the certificate of the chief clerk must stand. *Beyer v. Adams, In re Law*, 3 Jur. N. S. 709.

EQUITY PRACTICE.

ATTORNEY AND CLIENT.—*Lien for costs*—*Notice of claim to party liable to pay costs*—*Common Law Procedure Act, 1854, ss. 61, 62*—*Garnishment order by stranger after notice of lien*.—The following case as to the rights of an attorney to a lien for his costs on the costs payable by a party to an action, &c., to his client is one of some practical importance, particularly with reference to proceedings by a creditor of the client under the garnishee clauses of the Common Law Procedure Act, 1854. By the 61st sec. of that act a judge, upon the *ex parte* application of a judgment creditor, either before or after oral examination, and upon affidavits by himself or his attorney, stating the recovery of the judgment, its non-satisfaction, its amount, and that some other party within the jurisdiction is indebted to the judgment debtor, may order that all debts owing or accruing from such third party (the garnishee) to the judgment debtor shall be attached to answer the judgment debt; and such garnishee may be ordered to pay the judgment creditor the debt due to the judgment debtor. By sec. 66 the service of any such order on the garnishee binds such debts in his hands. P. brought an action at law against the defendants to recover damages for a breach of contract by their testator. The defendants instituted a suit to restrain that action, and on that such an order was made directing them to pay P. the sum of £600. The plaintiffs acted as attorneys and solicitors for P. in the action and suit; and their costs not having been paid, they gave notice to the defendants of their lien on the fund for the costs,

and not to pay it to P. An order was then made at common law, under the above provisions of the Common Law Procedure Act, 1854 (see ss. 61, 66), attaching the fund in favour of two judgment creditors. The plaintiffs then filed their bill to establish their lien on the fund, and it was held that they were entitled to such lien; but that there must be an inquiry as to the amount. *Simpson v. Prothero*, 29 Law Tim. Rep. 825; 5 Week. Rep. 814.

CHAMBER BUSINESS [*ante*, p. 71, vol. 3, pp. 45, 169, 317].—*Motion to commit for refusal to answer in chambers*—*Party's right to judge's opinion*.—Where a question arises for determination before the chief clerk of one of the judges, either party has a right to have the opinion of the judge, and this extends to the minutest matters. A party is examined in chambers under a winding-up petition, and asked a question by the solicitor of the official manager, which he declines to answer. His solicitor then respectfully requests an adjournment to the judge in chambers, but the other side, suggesting that a motion should be made in court to commit for contempt, the chief clerk concurs in that view, though without in any way advising it, and the motion is made: Held, that either party has a right on the minutest point to require an adjournment before the judge himself in chambers, and the motion refused with costs. *Re The London and County Assurance Company*, 5 Week. Rep. 794.

COSTS.—*Trustee*—*Costs as between party and party only*.—Where a bill is dismissed against a trustee, and there is no estate to be administered, the trustee only has costs as between party and party. *Saunders v. Saunders*, 3 Jur. N. S. 727.

CONTEMPT.—*For want of answer*—*Bringing prisoner to bar of court*—*Taking bill pro confesso* [vol. 3, pp. 45, 285]—1 Will. 4, c. 36, s. 15, Reg. 5—*Orders 74 and 76 of May, 1845*—*Costs of contempt*—*Discharge of prisoner*.—By the 74th order of May, 1845, it is provided, that "if any defendant be in prison, or being already in prison, be detained under an attachment for not answering, and be not brought to the bar of the court within thirty days from the time of his being actually in custody or detained (being already in custody under such attachment), he is to be discharged from the process for want of answer under which he was arrested or detained by the sheriff, gaoler, or keeper of the gaol in whose custody he is, without payment of the costs of his contempt, which, in such case, are to be paid by the plaintiff." By the 18th rule of sec. 15 of the 1 Will. 4, c. 36, it is provided, that where a defendant is in custody for not answering, and shall not put in his answer within two calendar months after he is lodged in gaol or prison, the plaintiff "shall," at the expiration of two calendar months, proceed to take the

bill *pro confesso*, and shall accordingly obtain an order for taking the same *pro confesso* within six weeks after that period, computed from the expiration of such two calendar months, within which he may be entitled to take the same *pro confesso*, or in default of so doing, the defendant shall be enabled to be discharged without paying any costs of contempt (see *Haynes v. Ball*, 4 Beav. 101). By the 5th rule of the 15th section of the same act, it is provided, that in the case of the last thirty days being out of term, the plaintiff shall have the first four days of the ensuing term to take a step: it is impossible for the two to stand together, as the events which happened in the following case show. The defendant was arrested on the 18th March for contempt for want of answer. The thirty days prescribed by 74th order of May, 1845, within which the plaintiff should in such a case proceed, expired on the 12th April. On the 17th April the defendant was turned over to the Queen's prison. On the 11th June he filed his answer, but did not pay the costs of his contempt. On the 12th June he was brought up on a *habeas corpus* (issued on the 10th June), to have the bill taken *pro confesso* against him. That could not be done, as the answer was filed, and the defendant was remanded to prison till payment of the costs of the contempt. On the 7th July the plaintiff moved to take the answer off the file for irregularity, and for the costs of that motion: Held, on the ground that the plaintiff himself had not complied with the regulation of the 74th order of May 1845, that the defendant was, if he applied for it, entitled to his discharge from custody, without payment of the costs of the contempt. *Fortescue v. Hallett*, 29 Law Tim. Rep. 309; 5 Week. Rep. 747.

ENFORCING ORDER FOR PAYMENT [vol. 3, p. 391].—*Levy of part under fi. fa.*—*Orders of the 10th of May, 1839.*—By the 1st order of 10th May, 1839, every person to whom in any cause or matter pending in the Court of Chancery any sum of money or any costs have been ordered to be paid may, after one month, sue out a writ or writs of *fi. facias* or of *elegit*. In the common law courts if a plaintiff sues out a writ of *fi. facias* in the first instance, then after such writ has been completely executed and returned, the plaintiff may have a writ of *capias ad satisfaciendum*. In *Miller v. Parnell* (6 Taunt. 370), and in *Green v. Foster* (2 Dowl. 191), it was decided that where a part of the debt only could be levied under the *fi. fa.*, and the defendant was detained under a writ of *habeas corpus ad satisfaciendum*, it was not necessary to refer on the latter writ to the amount of the levy made on the former. There does not appear to be any reported case where the second writ was a *ca. sa.* In the following case it appeared that the plaintiff was desirous to issue a

writ of attachment against the defendant for the residue of a sum of money, part of which had been levied under a *fi. facias*: and V. C. Stuart held, that where part of a sum of money directed by order of the court to be paid by the defendant to the plaintiff has been levied under a *fi. fa.* issued pursuant to the orders of the 10th May, 1839, and the amount of the levy appears upon the return to the writ, an order for payment of the balance within four days cannot be granted; but his Honour directed an order to be taken on affidavit of service of notice, that the chief clerk should ascertain and certify the amount which was due to the plaintiff from the defendant, and that the defendant, within ten days after the date of the certificate should pay to the plaintiff what should be so certified to be due. *Hipkins v. Hipkins*, 26 Law Journ. Ch. 512.

INJUNCTION.—*Liberty to bring an action—Extension of time—Neglect to try at time originally appointed.*—Where the plaintiff's bill was retained for a twelvemonth, with liberty to bring an action, the time was extended the day before the twelvemonth had expired, it appearing that the plaintiff had had a *bonâ fide* intention of bringing the action, and had not been culpably slow in taking steps towards bringing the matter to adjudication. In this case the action had been proceeded with up to the hearing, but the plaintiff withdrew the record in consequence of the absence of his counsel. *Farina v. Silverlock*, 5 Week. Rep. 827.

MOTION FOR DECREE [vol. 3, pp. 285, 391].—*Oral examination—List of affidavits or witnesses.*—By the 15 & 16 Vic. c. 86, ss. 15, 39, and the general orders relating to evidence, it is optional to parties to adduce oral evidence in all cases on the hearing of a cause: the rule as to appending to the notice of intention to proceed by motion for a decree a list of the affidavits intended to be used, would seem to be satisfied by giving a list of witnesses intended to be examined. At least, the Master of the Rolls in the following case, thought that, although not expressly authorised by the statute 15 & 16 Vic. c. 86, by the general orders, August 1852, and January 1853, that upon motion for decree witnesses may be orally examined; and in that case, to satisfy the terms of the general orders, a list of the names of the persons intended to be examined should be delivered with the list of affidavits. *Pellatt v. Nichols*, 5 Week. Rep. 724; 29 Law Tim. Rep. 289.

NEXT FRIEND.—*Married woman—Qualification—Solvency suspected—Affidavits.*—To disqualify a person from being a next friend to a married woman it is not sufficient that his solvency be suspected; there must be either admitted insolvency, or an irresistible inference of it. The Court of

Chancery will not, for the purpose of deciding whether a person is a proper next friend, admit of a number of affidavits to show whether or not he is solvent. It is not a valid objection to a next friend of a married woman that they are co-defendants. *Elliott v. Ince*, 3 Jur. N. S. 597.

SOLICITOR.—*Taxation of bill after twelve months*—*Bill for parliamentary work*—*Overcharge*—*Pressure* [*ante*, p. 72].—Without special circumstances there can be no taxation of a solicitor's bill delivered more than twelve months. In the following case, the taxation of a solicitor's bill was ordered, although more than twelve months had elapsed since its delivery; the bill containing gross overcharges; the solicitor having represented that the objections to the bill arose from the client's ignorance of parliamentary proceedings (one of the principal items being in direct contravention of the standing orders); and there having been no withdrawal of the objections to the bill, nor pressure by the solicitor. The case also establishes that either gross overcharge or pressure will justify taxation after the expiration of twelve months from delivery of the bill. The facts and circumstances were as follows:—A company being about to apply for a new act, asked their solicitor, S., what it would cost. S. replied, from £700 to £800. The act being ultimately unopposed, passed for £660; S.'s bill, delivered on the 11th January, 1856, amounting to £844. Immediately afterwards the amount was objected to, and on the 1st March, 1856, S. was informed by the new solicitor of the company that they would have it taxed. Nothing further was done until the 17th January, 1857, when S. wrote to say that he would charge interest. On the 12th May, 1857, the company presented a petition for taxation, alleging gross overcharges, amounting to fraud, and specifying, on affidavit, overcharges to the amount of near £100 on five items only in the bill. None of these overcharges were attempted to be justified by S.: Held, that notwithstanding the expiration of the twelve months, looking to the absence of pressure by S., or acquiescence of the company, taxation would be directed. In the above bill of £844, only £3 8s. 7d. was for business not connected with the soliciting the new bill in Parliament: Held, that notwithstanding the acts for regulating the taxation of parliamentary bills of costs, and referring them to an officer of the Houses, that the Court of Chancery was not deprived of its jurisdiction. Pressure alone without overcharge, or gross overcharge alone without pressure, will constitute special circumstances within the meaning of the act, so as to reopen the question of taxation. The special circumstances need not be such as to show want of knowledge, or opportunity for taxation, in the client. *Re Strother*, 3 Jur. N. S. 736: 5 Week. Rep. 797.

COMMON LAW.

AGENT.—*Want of authority as agent*—*Damages against agent*.—We have noticed the following case at p. 48; but as the point is one of importance, we have considered it might be useful to notice it again with some explanation. We may observe that the rule as between the vendor and purchaser of real property, that if the purchase goes off from want of title in the vendor, the purchaser is only entitled to the expenses incurred in investigating the title, and cannot recover for the loss of his bargain, is an anomalous case. The rule has been long established, and being supposed to be universally known, is taken to be incorporated in every contract for the sale of real estates. But this rule only applies to the particular case of failure to make out a good title; if the sale goes off for any other reason—*e. g.*, because the vendor refuses to complete the sale—the purchaser is entitled to full compensation for the loss of his bargain. No such exception to the general rule, by custom, can be set up in the case of a contract for the sale of a chattel, and the general rule must therefore prevail; and the only things the court can consider are, what the contract was, and what are the natural consequences resulting from the breach of it. The measure of damages is not necessarily identical between vendor and vendee, and between vendor and a person who, innocently or otherwise, has represented himself to be authorised, as the agent of a third party, to contract for him. The loss arising from the non-fulfilment of the contract from the want of authority, and the loss from the non-fulfilment of the contract, supposing the principal to be bound, are not necessarily identical: for although the plaintiff would be entitled to recover against the principal, if bound by the contract, the full measure of damages arising from the breach of contract, still he might not be able to do so from other circumstances which might arise. As before stated (*ante*, p. 48), the defendant, as agent of R., entered into a contract with the plaintiff for the purchase of a ship at a certain price. R., not having given the defendant authority, repudiated the contract, and the plaintiff sold the ship at a lower price. Both the contract price, and the price on re-sale, were the fair market value of the ship: Held, that the plaintiff, in an action against the defendant for a breach of his contract, that he had authority as agent of R., could recover as damages the difference between the two prices. *Simons v. Patchett*, 26 Law Journ. Q. B. 195; 3 Jur. N. S. 742.

ATTORNEY AND CLIENT [*ante*, pp. 49, 71].—*Responsibility of client for irregular process*.—The liability of a client for the acts of an attorney retained by him to conduct a suit differs to some extent from that of the liability of a principal for the acts of an

agent employed to perform some ordinary service. It has been long an established rule that the client is responsible for what the attorney does in the conduct of the suit. An attorney retained to enforce a judgment, issued a *ca. sa.* when the debt was reduced below £20, under which the defendant was arrested. The *ca. sa.* was set aside, and the defendant ordered to be discharged: Held, that the plaintiff, on whose behalf the writ issued, was liable for the arrest and imprisonment that followed upon it. *Collett v. Foster*, 5 Week. Rep. 790.

CARRIERS.—*Railway company as common carriers—Conditions—Limited liability* [vol. 3, pp. 387, 400]—*Nonsuit—Reasonableness of condition* [ante, p. 25]—*Railway Traffic Act, 1854* [vol. 3, pp. 130, 186, 304, 323, 401].—The following case shows how willingly the courts lend themselves to the attempts made by railway companies to restrict their liability as carriers of goods (see ante, p. 25). In an action in case against a railway company for negligence in carrying goods delivered to them as common carriers, whereby the plaintiff lost a market for them, the first plea traversed the delivery to, and acceptance of, the goods by the defendants, to be carried by them as common carriers; and other pleas averred that the goods were delivered on special conditions. It appeared that the plaintiff delivered a quantity of cheese at a station of the defendants' railway, to be carried to B. for the purpose of being sold at a certain market, and signed a note containing the condition, among others, that the company should not be liable for loss of market or other delay arising from detention: Held, that the judge at trial was right in non-suiting the plaintiff, on the ground that the defendants had not received the cheese to be carried by them as common carriers—confirming *Latham v. Rutley* (2 B. and C. 20), and *Walker v. The York and North Midland Railway Company* (2 Ell. and Bl. 750; 23 Law Journ. Q. B. 73): Held, by Channell, Serjt., the judge at the trial, that the above-mentioned condition was a reasonable one within the Railway and Canal Traffic Act, 1854, section 7. *White v. The Great Western Railway Company*, 26 Law Journ. C. P. 158.

COMPOSITION WITH CREDITORS.—*Bill of Exchange—Release—False representation by agent—Pleading—Averment sufficient after verdict—Evidence—Admission by an attorney as to a matter in which he is not employed.*—It may be doubtful whether a creditor accepting a composition on certain bills, the debtor and the other creditors, not supposing that he is the holder of any other bills for which the debtor is liable, can sue upon such other bills. But if he induces others to agree to the composition on the faith of his false representation that he is not the

holder of the other bills, or that the bills for which he accepts the composition are the only bills of the debtor which he holds, he cannot afterwards sue the debtor upon them, if this defence is properly pleaded and proved. An averment, in pleading such a defence, that the false representation was made by one H., as the agent of the plaintiff, was held, after verdict, to mean that it was made with the authority of the plaintiff. The only evidence to affect the plaintiff was, that one, S., whom he had employed as the attorney in an action on one of the bills sued on (the actions on which were afterwards consolidated), made a statement, before the other bill was due, that "all the bills" (meaning the bills now sued on, and those on which the composition had been accepted) were the plaintiff's bills. It was held, although the admissibility of the evidence had not been objected to at the trial, that, as it was the only evidence against the plaintiff, and it was doubtful whether it was admissible (and per Martin, B., it was not admissible), the verdict for the defendant was unsatisfactory, as not supported by evidence, and a new trial was granted. *Blackstone v. Wilson*, 26 Law Journ. Ex. 229.

CONTRACT.—*When complete—Agreement to print and publish—Distinction between denial of contract and excuse for breach—Pleading—Damage.*—The existence of a contract is a question independent of circumstances which may excuse its non-performance. If terms proposed by two parties to each other, in themselves constitute a complete contract, by which the one party is to do for the other a definite work at a certain time, and to receive a specified rate of remuneration, it is not the less a binding contract, which will subject the party who was to do the work to an action for not doing it, because at the time the terms were accepted something remained to be disclosed (as to the nature of the work, &c.), upon which it might depend whether there might not be a legal justification for refusing to perform it. Where a party has agreed to print and publish a certain specified quantity, as a sheet or a page, or a certain number of pages of printed matter at a certain time, and at a certain rate per page or sheet, there is a complete contract; and he cannot disclaim or deny the contract merely because, at the time he made it, he had not seen the matter to be printed, and that it might contain indecent, immoral, or libellous matter; for if it did so, though that would be a legal excuse for declining to print and publish it, it would be no ground for denying the existence of the contract, and would be no evidence under non-assumpsit, but must be specially pleaded by way of excuse. *Lara v. The General Apothecaries Company*, 26 Law Journ. Ex. 225.

DEED.—*Evidence to contradict its terms—Pleading*

—*Consideration*.—Although evidence is not admissible to show, contrary to the terms of a deed, that by the contract the consideration was not to be paid in money, as stated in the deed, but in goods, such evidence is admissible to show that, in point of fact, the consideration was so paid, and that goods were accepted in payment. *Smith v. Battams*, 26 Law Journ. Ex. 232.

EASEMENT [vol. 3, pp. 93, 260, 300, 319].—*Water* [vol. 3, p. 305].—*Right of action for fouling water*.—Where a party has a right to water from a river, canal, &c., he has a right to have it, as against a third party, without pollution by such third party. The plaintiff, by permission of a canal company, made a communication from the canal to his own premises, by which water got to those premises, and with which water he fed his boilers. The defendant, without any right or permission from the canal owners, fouled the water in the canal, whereby the water, as it came into the plaintiff's premises, was fouled, and by the using of it the plaintiff's boilers were injured: Held, that the above facts established a right of action in the plaintiff against the defendant. *Waley v. Laing*, 29 Law Tim. Rep. 312.

INTERPLEADER.—*Title of third party—Non-registered bill of sale*.—The case of *Carne v. Brice* (7 Mees. and W. 183) affirms the proposition that in interpleader cases on executions, the substance of the issue is, whether the execution creditor had any right to seize, and not to ascertain the strict legal rights of all parties. In such cases, the simple question is, whether the judgment creditor had a right to take the goods as the property of the person against whom he had obtained judgment, and it is wholly immaterial for the purposes of deciding this, which is the plaintiff and which is the defendant, the claimant or the creditor. Accordingly, it has been held, that in an interpleader issue between a claimant under a *bond fide* bill of sale duly registered, and an execution creditor of the assignor, the latter cannot set up a prior bill of sale to a third party, also *bond fide*, but void as against execution creditors for want of due registration under the 17 & 18 Vic. c. 36, s. 1. *Edwards v. English*, 26 Law Journ. Q. B. 193.

LANDLORD AND TENANT.—*Rights and liabilities of assignees of the reversion on part of demised premises—Joinder of tenants in common—Evidence of usage as to the terms of letting on a particular estate*.—Tenants in common, assignees of the reversion on a lease, may join in suing, and be jointly sued, on covenants therein. Assignees of the reversion may be sued by an outgoing tenant on a contract or custom of the country by which he is entitled to receive, on the termination of his tenancy by notice from the landlord, reasonable allowance for the value

of labour bestowed on the land, and the benefit of which he loses by such termination of his tenancy, although he has paid all the rent to the original landlord and received notice from him, the assignees having renewed the notice after the conveyance to them, and possession having been given to them. A stipulation in a contract of tenancy that the tenant shall keep a certain proportion of the land demised for grass, and pay so much per acre for any deficiency below such proportion, is extinguished by severance of the reversion. The rule of law as to importing into the terms of the tenancy, the "custom of the country," does not admit of evidence of the usage of a particular estate, or the property of a particular individual, however extensive it may be, it not being shown that the tenant was aware of it. *Womersley v. Dally*, 26 Law Journ. Ex. 219.

HUSBAND AND WIFE.—*Contract for necessities* [vol. 3, p. 387; vol. 2, pp. 178, 375].—*Credit to wife alone—Evidence of marriage—Nonsuit*.—When goods for which a wife has ordinarily authority to contract on the part of her husband, such as articles of dress, are ordered by her and delivered at his residence, where she also resides, *prima facie* the husband is liable, there being a presumption of law in favour of the plaintiff. And any evidence to rebut the presumption, as that the articles are unnecessarily costly in their character, or that the credit was given exclusively to the wife, must be submitted to the jury. The question whether the party who ordered the goods was the wife of the defendant must be raised at the trial; and the point is not raised, but rather waived, by an objection that the credit was given to the wife alone; and, *semble*, that if the parties live together, and the woman represents herself as the wife of the defendant, that is *prima facie* evidence that they were married. The objection that credit was given to the wife alone, means that it was given to her to the exclusion of her husband's liability; and the circumstance that the goods were booked to her alone, but in her marriage name as the defendant's wife, is not sufficient to show this; on the contrary, the fact that she was known by the plaintiff to be a married woman, and supposed to be the defendant's wife, is rather *prima facie* evidence that the credit was given to the husband. *Jewsbury v. Newbold*, 26 Law Journ. Ex. 247.

LIBEL.—*Justification—Demurrer*.—Action for libel, imputing to plaintiff duplicity, and that nothing was too base for him to be guilty of; plea, justifying on the ground that the plaintiff had falsely and fraudulently asserted that his signature to a certain memorandum called an "I O U" was not his handwriting. On demurrer, held sufficient justification. *Tighe v. Cooper*, 3 Jur. N. S. 716.

LIFE INSURANCE [*ante*, pp. 71, 72].—*Fraud in effecting*—*The life and his referees not the agents of the assured*—*Effect of company's prospectus*—*Evidence*.—The case of *Wheulton v. Hardisty* (*ante*, p. 71), upon the subject of life policy contracts, deserves particular attention. Loose dicta, and marginal notes hastily adopted into text-books, had led to an impression that referees are the agents of the party effecting an insurance, so as to bind him by misrepresentations or fraud on their part. Upon principle, it was difficult to understand why persons whose names were merely mentioned as being likely to give information to the office regarding the life insured should be clothed with so extensive an authority, while the hardship and inconvenience were obvious of allowing confidential answers, which the party insuring could neither know nor correct, to deprive him or his family of the provision which he had been endeavouring to make, by taking annual sums from his income during his life, or that of the *cestui que vie*. The Court of Queen's Bench, pressed by these considerations, and the want of real authority against them, decided, in the following case, that the referees are not the agents of the party insuring, and, also, that if the insurance be on the life of another, the life insured is not the agent of the party insuring. This relation, however, may of course be created between the parties by express contract; but, in the absence thereof, it is not to be raised by implication. The real question in all such cases is, what is the contract between the parties? It should also be observed, that a party employed by another to effect the insurance, as a broker, to make an insurance on a vessel, stands in a wholly different position from a referee. The decision of the court (which was not come to unanimously) was as follows:—Where a person insuring the life of a third party is, on negotiating the insurance, required merely to state his belief in the information furnished by the life and his referees, and the truth of such information is not made the basis of the contract, the person insuring is not affected by fraud of these parties, in furnishing information, it not appearing either that he was aware of the fraud, or that they were employed by him as agents in effecting the insurance. In the prospectus usually issued by an insurance company to its customers, it was stated that every insurance should be unquestionable, unless fraud was practised in obtaining it: Held (per Wightman, Erle, and Crompton, J.J., dissentiente Lord Campbell, C. J.), that this included fraud of the life and his referees, and was not confined to fraud of the assured. *Quære*, how far a policy ought to be controlled by such a prospectus. The mere fact that a prospectus has been usually circulated by a company, affords no evidence from which a

jury is entitled to infer that it has come to the knowledge of and has been acted upon by a party insuring, and positive evidence must be given that it has actually come to his knowledge (dissentiente Lord Campbell, C. J.). *Wheulton v. Hardisty*, 5 Week. Rep. 784.

PAYMENT.—*Acceptance of bills in satisfaction*—*Suing for consideration without producing or accounting for bills*.—If a bill of exchange has been given and received in payment of the price of goods, &c., the party to whom it was given cannot sue upon the consideration without producing or accounting for the bill. But if the bill has found its way back to the defendant, the plaintiff is at liberty to sue upon the consideration. This will explain the following decision:—The defendant, in payment of some goods, accepted two bills drawn on him by the plaintiff, the vendor, and returned them to him by post. The plaintiff, in a letter, to which a receipt stamp was affixed, acknowledged the receipt of the bills, and that they had been placed to the defendant's credit. The plaintiff afterwards sent the same bills by post to the defendant in a letter, requesting him to accept the bills payable at a banker's and then to return them. The bills never were returned to the plaintiff; the defendant denied having received them back, but there was other evidence that he had so received them. It was found as a fact, that the plaintiff had not accepted the bills as payment: Held, that the plaintiff might recover the price of the goods sold to the defendant in an action for goods sold and delivered, without producing the bills. *Widders v. Gorton*, 26 Law Journ. C. P. 165.

MASTER AND SERVANT.—*Action under Lord Campbell's Act* (9 & 10 Vic. c. 93)—*Liability of a master for injury to a servant in the course of his employment*.—The following is a more precise statement of the doctrines of the case of *Dynen v. Leach*, noticed vol. 3, p. 400:—Where an injury happens to a servant while in the actual use of an instrument, engine, or machine, in the course of his employment, of the nature of which he is as much aware as his master, and the use of which is, therefore, the proximate cause of the injury, he cannot, at all events if the evidence is consistent with his own negligence in the use of it being the real cause, nor in case of his dying from the injury can his representative, under Lord Campbell's Act (9 & 10 Vic. c. 93), recover against his master, there being no evidence that the injury arose through the personal negligence of the master. Nor is it any evidence of such personal negligence of the master that he has in use in his works an engine or machine less safe than some other which is in general use. Therefore, where a labourer was killed through the fall of a weight which he was raising by means of an engine

to which he attached it by fastening on to it a clip, and the clip had slipped off it, it was held that there was no case to go to the jury in an action by his representative against the master, although it appeared that another and safer mode of raising the weights was usual, and had been discarded by the orders of the defendant. *Dynen v. Leach*, 26 Law Journ. Ex. 221.

MORTGAGE.—*Abortive treaty for mortgage—Liability for costs—Borrower and lender—No implied rule of law as to title on proposed loan on security.*—The following decision is one deserving the attention of solicitors engaged in mortgage transactions, and suggests the necessity of an agreement as to the costs of investigating the title upon a proposed loan, especially where the amount is considerable, and the title likely to be complicated; the Court of Queen's Bench having decided that a party proposing to borrow money on security, does not bind himself by implication of law to produce a security of any particular degree of safety, or of any particular title, as in the case of a contract of sale where *prima facie* the vendor is to make out a title in fee. On the contrary, the transaction of borrowing implies that a security of any degree of safety may be made available by a term compensating for the increased risk. Therefore, where a treaty for a loan on specified securities goes off, the lender not being satisfied with the title, there being no contract by the proposed borrower to make any other or better title than he had, and the lender not being bound to accept the security unless he found it satisfactory, and no stipulation to pay costs in the event of the treaty going off, the proposed borrower is not liable for the costs incidental to the investigation of the title. *Melbourne v. Cottrell*, 29 Law Tim. Rep. 293.

SHERIFF.—*Wrongful discharge of debtor—Pleading—Evidence—Authority to discharge—Negligence of plaintiff conducing to discharge.*—In an action against a sheriff for wrongfully discharging the judgment debtor, the gist not being mere negligence as in an action for an escape, it is doubtful whether it is a defence that the plaintiff's negligence contributed to the injury, by his sending an order, which sheriff might have understood as authorising the discharge; and, *semble*, that the defence must be that the plaintiff authorised the discharge, and that it must be specially pleaded. Where it is so pleaded, and it is attempted to be supported by a written document, the construction of it being for the judge, if he leaves it to the jury, and it is not, in the opinion of the court, an authority to discharge (as if it was a mere countermand sent without knowledge that the writ had been executed), that being a misdirection, a verdict for the defendant cannot be sustained on the

general issue, the judge not having been desired to leave to the jury the question of negligence on the part of the plaintiff, even supposing such a question would be a proper one on that issue, which it should seem it would not be. *Hodges v. Paterson*, 26 Law Journ. Ex. 223.

WILL.—*Unattested paper—Reference to, by subsequent duly executed codicil.*—In the case of *Feraris v. Lord Hertford* (3 Curt. 468; on appeal, 4 Moo. P. C. 366), there were several codicils, some duly executed, and others unduly executed, and it was held that the expression in the last duly executed paper, "I hereby confirm all my wills and codicils," would only apply to the duly executed codicils, because such papers were in existence to satisfy the strict meaning of the word. But the case is different where there is nothing: before where the testator has left but one paper, and that unattested, as appears by the following case in the Prerogative Court. A. signed a paper intended for her will, in 1851, which was attested by only one witness. In 1856, on the day before her death, she duly executed a codicil "to my last will and testament." The paper of 1851 was not produced at the time the codicil was executed, but was found after A.'s death in a locked chest in her room; the codicil in a drawer. On a view of the two papers, and on evidence of the circumstances attending the factum of the codicil: Held, that the paper of 1851 was sufficiently identified as the last will and testament referred to by the codicil, and that it acquired validity from the due execution of the codicil. *Maddock v. Allen*, 29 Law Tim. Rep. 299.

COMMON LAW PRACTICE.

ARBITRATION.—*Common Law Procedure Act, 1854 (17 & 18 Vic. c. 125), ss. 3, &c.* [set out 1 Chron. 157, 158]—*Compulsory arbitration (ante, p. 27).*—A court of common law may, at least with the consent of the parties, refer a cause to arbitration under the compulsory clauses of the Common Law Procedure Act, 1854 (17 & 18 Vic. c. 125; see 1 Chron. 157, 158), although it has been sent from the Court of Chancery as one involving matters fit to be disposed of by a court of law. Where it was suggested that a cause proposed to be referred to the master under that statute turned almost entirely on a question of law, the court, with consent of the parties, referred it to the master, with a direction that, if that question arose before him, he should make an interlocutory report referring it to the court, which, in the event of the decision of that question being insufficient to end the dispute, would send it back to him to go into the rest of the account. *Master v. Hamilton*, 3 Jur. N. S. 722.

ARBITRATION [vol. 3, p. 402].—*Compulsory reference under the Common Law Procedure Act, 1854*

—*Error or misconduct of arbitrator, not apparent on the face of the award.*—We have noticed the following case in vol. 3, p. 402, but the following will be found to be a clearer statement. It may be questionable, whether the old rule of law, that it is not open to the parties to a reference to complain of an error of the arbitrator, except when apparent on the face of the award, or in case of misconduct, as it rested on the principle that the parties must abide by the award of any arbitrator they had selected, applies to the case of a compulsory reference under the Common Law Procedure Act, 1854; or whether, as the arbitrator under such a reference is the officer of the court, and the reference is a procedure in the suit in place of trial in the ordinary way, the court has a jurisdiction to review his decision. And it may be doubtful how far an error arising from a wilful disregard of the pleadings or admissions in the case may amount to such misconduct in an arbitrator as will warrant the court, under the old rule of practice, in correcting the error. But where the error has been extremely trivial in amount, as compared with the total amount adjudicated upon by the arbitrator, the court will, in any case of arbitration, be reluctant to re-open the case, and will probably not do so unless there has been intentional injustice. *Brown v. Hellaby*, 26 Law Journ. Ex. 217.

COSTS.—*Trover—Entry of verdict distributively—Practice and costs as to issues.*—Where a declaration is for articles distinguishable, and the verdict is generally for the plaintiff, and there is a rule to enter it for the defendant, and that is decided for the defendant as to some of the articles, there is no reason why the verdict should not be entered for the defendant as to such articles, and if possible the costs of trial should be apportioned. And it has been decided by the Court of Exchequer in the following case, that in actions for the conversion of goods, the verdict may, on the general issue, and a plea of not possessed, be entered distributively; and when a verdict has been taken for the plaintiff, subject to a point reserved, on which the defendant has leave to move to enter the verdict or to reduce the amount of damages, and the court, on the hearing of the rule, determine in favour of the plaintiff, except as to a portion of the chattels claimed, distinguishable, whether as fixtures or otherwise; this is equivalent to a direction that the verdict should be entered for the defendant for such portion, and not merely that the damages shall be reduced by the value of such goods, and the costs will follow such entry of the verdict as on a distributive issue. If a question arises as to the meaning and intention of the court the application should be made to the court to explain its direction; but if the question is as to the actual facts whether the goods are distin-

guishable or not, or whether there was any separate parcel of goods, the reference should be to the judge who tried the cause, as the question can only be settled by a reference to the facts stated in his notes, and it will be for him to arrange the entry of the verdict. *Freshney v. Wells*, 26 Law Journ. Ex. 228.

DEATH OF PLAINTIFF [vol. 2, p. 182; vol. 3, pp. 8, 234, 386].—*Ejectment—Entry of judgment nunc pro tunc.*—Before the Common Law Procedure Act it was held that a motion might be made by executors to enter a verdict pursuant to leave reserved at the trial, the party having died after trial, the court making it a condition by rule that the executors should be liable for costs in the event of the judgment being against them (*Freeman v. Rosher*, 13 Q. B. Rep. 780; S. C. 18 Law Journ. Rep. Q. B. 340). In the following case, where it appeared that a claimant in ejectment had died after trial, but before argument of a special case, subject to which the verdict was taken for him, it was doubted whether section 194 of the Common Law Procedure Act, 1852, applies so as to require a suggestion to be entered of the death; but after decision in favour of the claimant, the court allowed the heir to enter judgment *nunc pro tunc*. *Denison v. Holiday*, 26 Law Journ. Ex. 227.

INJUNCTION [vol. 3, p. 159].—*Ejectment.*—The 82nd section of 17 & 18 Vic. c. 125, provides that the plaintiff at any time after the commencement of an action, and whether before or after judgment, may apply *ex parte* to the court or a judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right. The 79th section provides that, in all cases of breach of contract or other injury, where the party injured is entitled to maintain, and has brought an action, he may claim a writ of injunction. It has been decided that a court of common law cannot grant an injunction in an action of ejectment under the above 82nd section of the Common Law Procedure Act, 1854, 17 & 18 Vic. c. 125. *Baylis v. Legros*, 26 Law Journ. C. P. 176.

JUDGMENT, ACTION ON.—*Application for costs on action on judgment should be made at chambers.*—An application, on the part of a plaintiff, to be allowed costs in an action on a judgment under the statute 43 Geo. 4, c. 46, s. 4, must be made, in the first instance, at chambers, although, if it raises any question of difficulty, the judge may refer it to the court. *Claridge v. Wilson*, 26 Law Journ. Ex. 246.

NEW TRIAL.—*Moving for in person by a prisoner—Habeas corpus to move for a new trial.*—The

court will not grant a writ of habeas corpus to bring up a prisoner, in order that he may move in person for a new trial, in an action in which he is a party. *Binn v. Moseley*, 3 Jur. N.S. 694.

VENUE.—*Changing—Irregularity—Notice of trial—Judge's order—Trial in the wrong county.*—Where an order has been made, by indorsement on a summons, either by a judge or by the opposite party, to change the venue to a different county, the trial in such county, after notice of trial for such county, is a mere irregularity, although the order has not been properly drawn up nor the venue in the declaration altered according to it; and the proceedings will not be set aside after judgment has been signed, or the first four days of the next ensuing term have elapsed.—*Schoyn v. Smith*, 26 Law Journ. Ex. 226.

BANKRUPTCY.

ACT OF BANKRUPTCY.—*Going abroad—Remaining abroad—Time—Bankrupt Act of 1849, ss. 67, 88, 89, 90, and 233—Disputing adjudication in colonial courts.*—The 233rd section of the Bankruptcy Consolidation Act provides:—"That if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication), within two calendar months (1 Chron. 51) after the advertisement of the bankruptcy in the *London Gazette*, or (if he were in any other part of Europe at the date of adjudication) within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit, or other proceeding to dispute or annul the fiat or the petition for adjudication, and shall not have prosecuted the same with due diligence and with effect, the *Gazette* containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, or before the date and filing of the petition for adjudication, and that such fiat was sued forth or such petition filed on the day on which the same is stated in the *Gazette* to bear date." In the following case the bankrupt, a trader within the Act, being largely in debt, left England without any secrecy, in November, 1853, for New Zealand. In March, 1855, a petition was filed against him, and he was adjudged a bankrupt: Held, that, notwithstanding the 89th & 90th sects. of the Bankrupt Act of 1849, and the length of time that had elapsed, the adjudication was valid, inasmuch as the bankrupt, by remaining abroad, must be assigned to have done so

with an intention "to defeat or delay his creditors," and had thus committed a fresh act of bankruptcy; and this, irrespective of the intention with which he might originally have left England. The property of the bankrupt in New Zealand having been seized under an authority from the assignees here, the bankrupt commenced an action in the Supreme Court of that Colony to set aside the adjudication. A demurrer for want of jurisdiction was allowed by that court, and from this decision the bankrupt appealed to the Privy Council: Held, that this was a proceeding which kept alive his right under the 233rd section to dispute the adjudication, and that an action for that purpose need not necessarily be brought in an English court, when the bankrupt was residing in any of the colonies. *Re Bunny*, 29 Law Tim. Rep. 818.

ARRANGEMENTS [*ante*, p. 28].—*Bankrupt Law Consolidation Act, 1849—Arrangement clauses, 211, 222—Certificate—Refusal of composition, effect of—Creditor refusing composition cannot sue.*—The 211th section of the Bankruptcy Consolidation Act, 1849, relating to arrangements by traders with their creditors, provides, that traders unable to meet the claims of their creditors may petition the Court of Bankruptcy for protection. The 215th section provides, that the creditors at the first sitting shall prove their debts; and if three-fifths in number and value of those who have proved debts to the amount of £10 and upwards, assent to the proposal made by the debtor, a sitting for confirmation is to be appointed. The 216th section enacts, "that at such second sitting, or at any adjournment thereof, the creditors may also prove their debts; and if three-fifths in number and value of those who have proved debts to the amount of £10 shall agree to accept such proposal as was assented to at the first sitting, the terms thereof shall be reduced into writing, and the creditors shall sign the same; and such resolution or agreement (subject to such confirmation as is hereinafter mentioned) shall thenceforth be binding, and of full force, as well against such petitioning trader as against all persons who were creditors at the date of his petition, and who had notice of the said several sittings of the court." By the 221st section, it is provided, "that so soon as the said resolution or agreement shall have been carried into effect, and the creditors of such petitioning trader shall have been satisfied, according to the tenor thereof, the court shall give to such petitioner a certificate under the hand and seal of the commissioner, in the form contained in the schedule A c, to the act annexed, setting forth the filing of the petition, the resolution or agreement of the creditors, and that the said resolution or agreement has been fully carried into effect;

and such certificate shall thenceforth operate to all intents and purposes as fully as if the same were a certificate of conformity under a bankruptcy, except only that any debt which shall have been contracted wholly or in part by reason of any manner of fraud or breach of trust," &c. In the following case, it was decided by the Court of Common Pleas, that where a trader, under the above arrangement clauses of the Bankrupt Law Consolidation Act, 1849, has made a proposal of a composition to his creditors, which has been accepted by a resolution of three-fifths in number and value, and has obtained a certificate under the 221st section of the act, a creditor, to whom he tendered, but who refused the composition before certificate, cannot maintain an action for the original debt. *Tindall v. Hibberd*, 26 Law Journ. C. P. 173.

APPEAL.—*Leave to appeal to the House of Lords*—*Delay*—*Bankrupt Law Consolidation Act, s. 18.*—An application for leave to appeal to the House of Lords from an order in bankruptcy must be made, if not immediately, at all events within a reasonable time. *Re The Royal British Bank*, 3 Jur. N. S. 602.

BILLS OF SALE [vol. 1, pp. 64, 136, 280, 407; vol. 3, pp. 45, 87, 259].—*Leasehold with fixtures*—*Mortgage—Registry not required.*—We have before (vol. 2, p. 383, and vol. 3, p. 87) noticed the cases of *Mather v. Fraser* (2 Kay. and John. 536; 25 Law Journ. Ch. 361) and *Waterfall v. Penistone* (6 Ell. and Bl. 876; 26 Law Journ. Q. B. 100) as to the necessity for registering a bill of sale of fixtures. *Mather v. Fraser* was a case of mortgage of land with the machinery thereon, and it was expressly held, by Wood, V. C., that the machinery partook of the nature of the soil, and passed by the grant of the land, and, consequently, the Bills of Sale Act, could have no application (2 Chron 383). It was also held that the same result would follow if it had been an assignment of the land by a mere termor, as in *Ryall v. Rowles* (1 Atk. 165), and the other cases of that class. In *Waterfall v. Penistone* (3 Chron. 87), there was an assignment of machinery only. The mortgage in *Mather v. Fraser* was made by the owner of the fee; but the following case shows that it makes no difference whether the mortgage be by the owner of the fee or by a leaseholder. Mr. Justice Erle, in *Waterfall v. Penistone*, speaking of *Mather v. Fraser*, said, the result of the whole transaction was equivalent to a mortgage of the premises with the machinery in question thereon, and so the deed was not a bill of sale according to the decision of the Vice-Chancellor in that case. A mortgage of leasehold property with the fixtures thereon, being trade fixtures, as per inventory, is a mortgage of the fixtures within the case of *Mather v. Fraser* (2 K. and J. 536), and, consequently, need

not be registered under the Bills of Sale Act (17 & 18 Vic. c. 36). *Exp. Scott, re Brooke*, 29 Law Tim. Rep. 314.

CERTIFICATE.—*Misrepresentation*—*False entries—Fraudulent design—The Bankrupt Law Consolidation Act, section 256.*—It is unnecessary to decide whether a case of gross and palpable misrepresentations, and one in which false entries have been made by the bankrupt in his books for the purposes of concealment and fraud, does or does not come within the provisions of the 256th section of the act 12 & 13 Vic. c. 106, and the offences there enumerated, to justify severe punishment to the bankrupt. The commissioners having held that such conduct came within the section, and having on that ground suspended the certificate of the bankrupt for twelve months, without protection, and ordered such certificate, when granted, to be of the 2nd class, the Lords Justices, upon an appeal by the bankrupt: Held, that the decision was one required by public and private justice, and dismissed the petition, ordering the bankrupt's deposit upon the appeal to be applied so far as it would extend, towards discharge of the costs of the assignees. *Re Stephankoff*, 29 Law Tim. Rep. 317.

PROOF.—*Double* [vol. 3, p. 186].—*English and foreign firm bankrupt—Election—Joint and separate estates.*—Where bankrupts are members of two firms, one English and the other foreign, the joint estate cannot be split into two parts, and the English creditors be confined to the English assets, and the foreign creditors to the foreign assets. Indeed, where there is a bankruptcy of a partnership, and one joint estate and several separate estates, and a joint creditor of the partners seeks to prove against the joint estate of all, and the separate estate of one or more, it is established, with a view to equalise loss, that such creditors shall not so prove, but that they must elect as between the joint estates of all, and the separate estate or estates of such as have contracted with them in their separate capacity. But this rule is an arbitrary one, and is not to be extended, as shown by the following case:—C., L., and D. trade as merchants in London as C., L., and Co., and at Constantinople as C. and Co.: Held, that a creditor holding a bill of exchange drawn by the Turkish firm upon and accepted by the London house, had a right to prove in respect thereof as against the joint estate of the three which had come to the hands of the official assignee under the separate bankruptcy of L., quite irrespective of what he might obtain as his share of the joint assets of the Turkish firm. The law of election does not apply to such a case. It applies only to the case of a firm becoming bankrupt, and where there is one joint estate and several separate estates, and a joint

creditor of the partnership seeks to prove against the joint estate of the firm, and the separate estate of one or more of the partners. *Exp. Lascaridi, re Leno*, 29 Law Tim. Rep. 298.

PROTECTION [vol. 3. p. 186].—*Until final examination*—12 & 13 Vic. c. 106, s. 112.—*To what protection extends*—*Discharge*—*Debts not provable, protection effectual*.—By the Consolidation Act, s. 112, if a bankrupt be not in prison or custody at the date of the adjudication of bankruptcy against him, he is to be free from arrest or imprisonment by any creditor for such further time (after his surrender) as shall be allowed him for finishing his examination. It has been decided that the protection granted to a bankrupt who has not passed his last examination extends to an arrest on the part of a creditor whose debt, having accrued since the bankruptcy, is not provable thereunder; and where the bankrupt, in order to secure the debt of a third party, has executed to the creditor a warrant of attorney, upon which judgment was entered up, and execution issued, and he was arrested, he was ordered to be discharged under s. 112 of the Bankruptcy Act, 1849. *Exp. W. Shepherd, re E. and W. Shepherd*, 29 Law Tim. Rep. 298.

PROTECTION.—*Contempt of Court of Chancery* [vol. 3, p. 160].—*Attachment*—*The interim order*—*The final order*—*Debt, legal and equitable*.—In the following case two points of some importance were decided—viz., 1, that the protection statutes are not confined to legal debts only, but extend to equitable debts also; 2, that all debts in respect of which the party petitioning for protection is entitled to be protected from process by the final order ought to be considered as protected by the interim order also. A trustee having been ordered, by an order of the Court of Chancery founded upon the certificate of the chief clerk of Stuart, V. C., to pay into court the balance of trust-funds remaining in his hands, failed to obey, and a writ of attachment was issued against him by the court, which was sent down to the sheriff of Warwickshire, who returned, that previously to his receiving the writ, the trustee had, on his petition, obtained an order for protection from the local county court, and that the sheriff had, therefore, no power to arrest him. The plaintiff in the suit then called upon the sheriff to show cause why he should not himself be committed for not having taken the trustee on the attachment; when it was held, that the interim order, as well as the final order, was a protection to the trustee against arrest, and that the sheriff had acted rightly: Held, that the provision of the act 7 & 8 Vic. c. 96, s. 26, applied to equitable as well as to legal debts. *Wyllie v. Green*, 29 Law Tim. Rep. 307; 5 Week. Rep. 775.

PUBLIC COMPANY.—*Joint-Stock Companies Act*, 1856 [vol. 3, pp. 175—177].—*Winding-up company* [ante, pp. 61, 63].—*Practice*—*Service*—*Advertisement*—*Injunction to restrain creditors' actions*—*Amendment of petition*.—By the 11 & 12 Vic. c. 45, s. 10, it was required that a petition for winding-up a company should be advertised in the *Gazette* only. This was altered by the 12 & 13 Vic. c. 108, s. 2, which requires the advertisements to be inserted in two of the London daily morning newspapers, as well as in the *Gazette*. The Joint-Stock Companies Act, 1856, provides that until rules are made concerning the mode of proceeding to wind-up a company, the general practice of the Court of Chancery, including the practice in winding-up cases, shall apply to all proceedings for winding-up a company. It has accordingly been held that in a petition presented to the Court of Bankruptcy under the Joint-Stock Companies Act, 1856 (19 & 20 Vic. c. 47; stated vol. 3, pp. 175—177), to wind-up the affairs of a company registered under that act, four clear days' notice of the intention to apply to the court to appoint a day for the hearing of the petition should be served at the principal place of business of the company. Also, in the absence of any special rules to be made in pursuance of the powers contained in the act to the contrary, seven clear days' notice of the hearing of the petition should be given by advertisement in the *London Gazette*, and two London daily morning newspapers, in accordance with the requirements of the Joint-Stock Companies Winding-up Act, 1849 (12 & 13 Vic. c. 108, s. 2), and the hearing of the petition will be ordered to stand over for that purpose, and in the meantime the petition must be amended and re-answered. Where the liability of the shareholders of the company is not limited, the court has no power, under section 84, to grant an injunction to restrain actions at law by creditors, against individual shareholders, in cases where the debts, in respect of which the actions are brought, were incurred before registration under the Joint-Stock Companies Act, 1856. If any error appear in the petition, in respect to the name or style of the company, the court will direct the petition to be amended in that particular. *Re The Welsh Potosi Lead and Copper Mining Company*, 29 Law Tim. Rep. 314.

PUBLIC COMPANY.—*Joint-stock company*—*Winding-up*—*Witness*—*Examination of*—*Evidence*.—In examining a witness connected with a company which is being wound-up in the Court of Bankruptcy, relative to the trade dealings and effects of such company, it is not competent to inquire into the private circumstances of the witness at a period long antecedent to his connection with the company. *Re The Metropolitan Bread Company (Limited)*, 29 Law Tim. Rep. 299.

PUBLIC COMPANY.—*Joint-Stock Companies Act, 1856*—*Winding-up* [vol. 3, pp. 175—177; *ante*, pp. 61, 63].—*Practice—Proof of debts.*—By s. 99 of the Joint-Stock Companies Act, 1856, the court is empowered to make rules for regulating proceedings for the winding-up of companies in the Bankruptcy Court under the act, and it provides that subject to such rules the general practice of the Court of Bankruptcy shall apply to all proceedings under the act. In petitions to wind-up the affairs of a company in bankruptcy under the provisions of the above Joint-Stock Companies Act, 1856 (19 & 20 Vic. c. 47), the court will not, at the sitting for the appointment of an official liquidator, admit any proofs, or allow claims to be entered upon the proceedings which require discussion, but will, in accordance with the ordinary practice in bankruptcy, appoint a day for the proof of debts generally, and for investigation of such claims: *Semble*, under sec. 99 of the Joint-Stock Companies Act, 1856, the court has power to appoint a day especially for proof of debts. *Re The London, Harwich, and Continental Steam-Packet Company*, 29 Law Tim. Rep. 315.

CRIMINAL LAW.

EVIDENCE.—*Deposition—Witness too ill to travel* [vol. 3, pp. 189, 289, 327; 2 Id. 14].—If a witness has had an attack of paralysis, and is unable to hear or speak or give evidence, and his physician does not permit him to go about, his deposition may be read under the statute 11 & 12 Vic. c. 42, s. 17, though it would not endanger his life to travel or to be brought into court. *The Queen v. Cockburn*, 26 Law Journ. M. C. 136.

EVIDENCE.—*Notice to produce secondary evidence.*—To let in secondary evidence of a written document, there must in general be a notice to produce it. In an action of trover for a bill of exchange it has been held unnecessary to give notice to produce the bill. And the same has been decided in the following case, where the indictment alleged that the defendant stole a letter addressed in a certain manner. An indictment alleged that the prisoner, being in the employ of the Post-office, stole a post letter, &c., to wit, a post letter directed and addressed as follows, that is to say (setting out the address), which contained certain property, &c. At the trial, a witness having deposed that he employed a man to post a letter containing the property in question: Held, that he might be asked how that letter was addressed, although no notice to produce the letter had been given. *Reg. v. Clube*, 3 Jur. N. S. 698.

RESCUE.—*Person unlawfully arrested.*—Though a person may lawfully resist an attempted unlawful apprehension, yet the forcible rescue of a person

from unlawful custody is illegal. *Reg. v. Almey*, 3 Jur. N. S. 750.

TRIAL.—*Practice on criminal trials—Several prisoners—Order of defence* [vol. 3, p. 405].—Where several persons are indicted for the same offence, the order in which they should be called on to make their defence is not determined by the order in which their names stand in the indictment. *Reg. v. Holman and Poplett*, 3 Jur. N. S. 772.

TRUCK ACT [vol. 3, pp. 52, 330].—*Artificer—Contractor—Artificer not bound to labour personally*—1 & 2 Will. 4, c. 37, s. 25 [stated vol. 3, p. 330].—The case of *Ingram v. Barnes* (3 Chron. 330) on the construction of the Truck Act, and its application to a contractor for labour, has been taken into the Exchequer Chamber, where the decision of the majority of the Queen's Bench was affirmed. Reliance was placed upon the following expressions in the judgment of Parke, B., in *Riley v. Warden*, (2 Ex. 68), "That upon the true construction of the act it is to be taken as applicable to those persons only who strictly contract as labourers—that is, to such as enter into a contract to employ their personal services, and to receive payment for their service in wages;" also, on the opinion expressed in the judgment of Maule, J., in *Sharman v. Sanders* (13 C. B. 166), "that the sort of persons in those trades, who are meant to be protected, are persons who are hired to labour with their hands for daily wages, and not persons who contract to procure a certain quantity of work to be done, if they themselves are not the persons who have to do any part of it." And the summing-up of Talfourd, J., in that case was said to be correct, he having told the jury "that the plaintiff was not entitled to a verdict unless he was an 'artificer' under the Truck Act, and that they could not find that he was an artificer unless they should think it was proved affirmatively that he, being in the situation of an employer and contractor, was also a person whose personal service was an ingredient in the contract, which the defendants would have had a right to enforce, and the absence of which they would have a right to complain of." The decision of the Exchequer Chamber was, that a labourer or artificer who enters into a contract to do certain work at so much per foot, or per thousand, or the like, under which contract he may get the work done by other persons, and is not bound to bestow his own personal labour, is not within the protection of the Truck Act, 1 & 2 Will. 4, c. 37, so as to defeat a set-off for goods supplied at a shop in which the employer is interested, in part payment of the wages or money to be paid under the contract. So held by the Court of Exchequer Chamber in affirmance of the decision of Lord Campbell, C. J., and Coleridge, J. (*Erle, J.*,

dissentiente), in the Court of Queen's Bench. *Ingram v. Barnes*, 5 Week. Rep. 726; 29 Law Tim. Rep. 297.

THE LAW AND LAWYERS, BY A "PROFESSIONAL MAN."

A work has recently been published (or rather republished, for it seems to have been contributed at various times to some newspaper), entitled "Our County Courts; their Practice contrasted with that of the Superior Courts, with suggestions for Improvement of both. With an additional Chapter on the Practice as to Real Estate. By a Professional Man. London: Partridge and Co.," which contains some remarks upon the state of the law and the profession which some of our readers may like to read, and for this purpose we will furnish some extracts from the work. At one time we were inclined to think that the work was not written by a professional man, but, on re-consideration, we are convinced that it is the production of a solicitor who must have had some experience in the profession. In many parts the remarks upon the profession and practitioners are not complimentary, but we think that the writer has a good object in view, and, therefore, that he must not be too severely criticised on this account. Speaking of the county courts, and the altered procedure of the superior courts, the writer says: "The recent Act of Parliament, called 'The Common Law Procedure Act,' has clearly shown that justice can be administered at a trifling expense to the people under the superiority, integrity, and impartiality of those who preside over the three courts at Westminster. It is a known and acknowledged fact, that to obtain judgment against a debtor in the county court for a debt of twenty guineas, the creditor must actually expend in court-fees about six pounds, besides paying his attorney; whereas, in the superior courts, he can arrive at the same conclusion for less than twenty shillings out of pocket; and so it works in proportion for any debt below that amount in the *County Court*! It has become notorious, the monstrous advantage the county court gives in *provincial* places where the courts are held, for the exercise of petty tyranny and oppression, publicity and degradation, towards the parties litigant, according to the influence or weakness they severally carry, arising from a local knowledge or local prejudices, aided by the fawning advocacy of a shrewd attorney who may have what is commonly called (and dreaded) the ear of the court. It may be asked—How is this knowledge or prejudice to corrupt the stream of justice? I answer, in a variety of shapes—a most insidious poison infused into the system imperceptibly by the smallest reptile,

and the smallest puncture. The venom is safe to spread itself over the whole, and the fountain-head of justice becomes unwittingly corrupted. Look at the constitution of the court and its officers. Every county is divided into districts, and one judge presides over the whole of the districts. He ought to be a stranger, but he may be one who had, up to the creation of the county court, held the appointment of judge of a borough, or some other peculiar and abolished court in that district; if the latter, so much the more dangerous, because of his local knowledge, local friendship, local connections, and local prejudices. The judge appoints his clerks, sub-clerks, and bailiffs; and who are the clerks and sub-clerks, generally attorneys, each residing and practising in his own district town. The clerk and bailiff know everybody in that district. The clerk has his clients and friends. His clerk and bailiff have their friends; the tale of the suitor is told to his friend the bailiff, with no small amount of glossary—the bailiff tells the lawyer's clerk, and the clerk tells his master, who tells the judge, who embodies in himself the whole functions of jury and arbitrator; and who is supposed to be governed by the evidence, and to adjudge accordingly. Let us, by the way, regard the clerk *alone*. Can anything prevent him from abusing the judge's ear in a gentlemanly conversation about the length of the cause-list, and the time likely to be occupied? Is it impossible for a chance inuendo to escape? Can you prevent him from describing his excellent friend and client as of known repute, high-minded, wealthy, and respectable, incapable of a dishonourable action, and his opponent just the reverse in all things. Thus, then, such officers may be the means of throwing discredit upon such a sweeping, uncontrolled alteration of the law of debtor and creditor:—let the judge be ever so upright, you cannot take from the human mind the effect, to an extent, of these secretly conveyed, invidious, and wicked prejudices. I am sure it must strike the mind of every right-thinking person that this system ought not to be suffered to exist. A judge who has so much power (for he has more than the Chief Justice of the Queen's Bench) ought to know *no one* in his *judicial* character; and, to keep him from that knowledge, he should be a stranger holding no intercourse with the circuit clerks, who, under severe penalties, should not be suffered to approach him other than strictly to carry out the *forms only* of the courts to which they are severally attached. In dismissing from our *present* consideration the importance of separating the official from the judicial functions of the inferior courts, let me call the attention of the public to the constant infringement of the Act of Parliament. There is a special section which prohibits, under a *heavy penalty*, any officer

from being concerned in any manner for any suitor before the court, and no person but the suitor, or his counsel, or attorney is to be allowed to interfere in any proceedings. Now, it is notorious that some clerks do interfere and advise, and they take upon themselves to select the advocate to support the case before the court, should it become necessary, and no doubt *sub rosa* avail themselves of part of the emolument! they also permit persons, calling themselves agents and accountants, who are pettifoggers, without the slightest legal or moral responsibility, to speculate upon the cupidity and fears of the public, and for the services rendered by the latter class of persons, they carefully avoid the scale of *small* professional fees allowed to a responsible party, and take to themselves in many instances as much as twenty-five per cent. upon the amount received.

With respect to the interesting subject of professional remuneration for proceedings in the county court, the writer (pp. 34—36) observes:—"The Legislature, in order to give to the people cheap law, has jumped from one extreme to the other in attempting to put an end to the exorbitant fees charged by some attorneys. The compensation allowed for actual and arduous trouble is of a character so contemptible that no man will, unless he regards his client's interest and reputation more than his own, enter these courts. The maximum amount of compensation for all the labour bestowed in getting up, perhaps, a difficult case, attending the court many hours, examining a host of witnesses, and arguing some nice questions of law about a debt or demand under £20, is wretched indeed, and, wretched as it is, the judge will sometimes *refuse to allow it*. I once heard a cause tried in the county court in the country; the subject was an aggravated assault upon the wife of a poor man. A jury was empanelled (*fortunately for the plaintiff*), and the trial occupied six hours at the least in a densely-crowded court; attorneys were employed on both sides; all the shrewdness of well qualified men was brought to bear upon this case; artful and ingenious questions were devised, and put to the parties and their witnesses, in order to get out, or pervert the real truth; and, after all the evidence on both sides had been taken, and the defendant's advocate had been heard, in a speech replete with legal tact and first-rate forensic acumen, the woman's advocate had his reply, and he gave it in a masterly manner, full of feeling and eloquence, utterly annihilating and scattering to the winds the hypothetical reasonings of his opponent. The mist was cleared away, and the facts stood forth unimpeachable. But the judge, in summing up the evidence to the jury, introduced, as is not uncommon, some observations of his own as to the probabilities and motives of the defendant, and

he went the length of calling attention to the station in life of the plaintiff in regard to damages, so as evidently to show that had the matter rested with *his Honour* alone, the verdict would have been put in peril, or the compensation for a *gross* outrage reduced to an amount much below that which had been demanded. The jury happened to be men of intelligence, and no doubt they thought, with the general audience, that the province was theirs to regard the force of probabilities against *unquestionable proofs*, and that it was their business to assess the amount to be given, and they gave their verdict for the full amount claimed. One bystander asked another what he thought the plaintiff's advocate would be allowed for the exercise of so much talent? 'Five guineas, at the least,' was the enthusiastic ready reply. 'You are mistaken, Sir,' said the other; 'he will be allowed *fifteen shillings*, and out of that he has to pay his own travelling expenses.' That trial was to the attorney a positive pecuniary loss, and the court a degradation. The judge, had he been so minded, *had the power* to refuse him the 15s.; but he had none to order the payment even of his railway fare. Not so in the superior courts. In either of them he would have obtained a profit of at least £20 and his expenses, besides a fee to counsel, upon whom would have devolved the great labour of the trial. Is this consistent? By a parity of reasoning, if the one allowance is *too large*, surely the other must be *too small*. In the one he gets £20 for merely getting up the case, and becoming very little more than an ordinary spectator of the fight, while in the other he gets 15s. for all the labour from the beginning to the end, and out of that he must pay his own personal expenses. Will any one contend that *both* are right? Tradesmen may differ in the price fixed upon some particular article: the one may exact a large profit, the other may be content with a moderate one. Such dealings soon explode. Ought not the price of law to be compensatory, and not extravagant. It amounts to more than a case of absurdity as it now stands. Why not adopt the old maxim, *Medio tutissimus ibes*, and let the amount of payment be decently regulated, taking for its basis the principle of that maxim." Returning to the subject in another part of the work (pp. 45—50), the writer observes:—"I hope I have now satisfied the reader that there exist inconsistencies and unintelligible, insufficient, and useless formalities in *all* the courts. If the practice of the county court is defective, that of the superior court is equally so; and the whole, under proper and efficient workmen and artisans who understand *their business*, might be brought to such a state, that scarcely any mystery or matters complicated and unintelligible need exist at all. I admit it will be a Herculean task to lick the great

bear into anything like shape, but it *can* be done, and if it can be done, then let it be done, and done quickly, and by that means let the suitor have justice in a straightforward manner, and at a reasonable price; but the question of what is a reasonable price is a matter requiring almost as much attention as the character and nature of the labour required. Professional men must live by their profession, and in a respectable manner; their education and talent command respect, and their reputation should be a safeguard from reproach. The judges are ever ready to punish, as a fault, the most trifling offence of an attorney, committed in *his character of attorney*. The public being by that means protected, surely no respectable man will deny to a respectable practitioner a corresponding protection, in the shape of gentlemanly treatment and fair compensation. Have regard to the salaries of public officers, and the leading clerks of large banking and other establishments, and ask any one of them if he would be content to dance attendance for a whole day at Westminster, and that, day after day, for a fortnight together, for a fee, according to the business, ranging between 6s. 8d. and 20s. The interest of the suitor and his family rests upon the watchfulness and zeal of the attorney; his legal attainments, and his hours of care are thus paid for, bearing a miserable comparison to the self-important banker's clerk, whose day of usefulness begins at nine, and ends at five o'clock. I have not the least doubt many persons have been struck with astonishment at the enormous sums said to have been paid for lawyer's bills, but those persons have never troubled themselves to inquire how much of those bills has been paid to counsel, witnesses, surveyors, auctioneers, and fees at the public offices, upon every step taken in a cause. In a recent case the lawyer's bill was taxed at £95. The business had occupied four months in hard mental work, and the out of pocket amounted to upwards of £70. Why, a journeyman blacksmith would have earned and received more money in the time, without the necessity of a good coat, and other things in keeping with it. Bear with me a little while; there are good men and bad men in all trades and professions, and the law has its share of both. The bad man schemes to improve his fees, but the good man despises such trickery. Look at the everyday practice as to briefs for counsel upon a trial; the *unprincipled* attorney will introduce the veriest trash, because he knows he is to be paid *by length*, and the taxing officer is safe to reduce *that length*, with very little regard to the important matter. The *principled* attorney prepares his brief, containing *nothing* but *matter material to the case*; the one shares the fate of the other; and if both should happen to be of the same length, the chances

are, that both would be reduced the same number of sheets, so that the unprincipled man, by his trash, covers his material portion, and congratulates himself that he has hoodwinked and out-witted the master, who sometimes, from slender experience, exercises, somewhat unjustly, the hackneyed and abused word *discretion*; and the attorney who has acted with honest zeal becomes, in this manner, cheated of his fair compensation, and returns to his office thoroughly disgusted. This is not an imaginary case: and it is in this manner the zealous, honest, hardworked, indefatigable attorney is treated, and his only dependence for fair remuneration is upon the liberality of his client, who seldom opens his purse for a gift, beyond that which the rules and practice allow. But the brief portion is not the only one by which the attorney is ill used. It often happens that a summons before a judge at chambers is made returnable at eleven o'clock in the morning, at which hour he must attend, and he may be kept waiting until three, four, five, six, and sometimes seven o'clock in the evening; and for those hours collectively, he is entitled to a fee of 6s. 8d., and no more, and so an attorney's day is lost, which ought at least to be worth two guineas to him. Take the case of a trial at Westminster, or the important and awful one that took place, a short time since, at the Old Bailey. A serjeant-at-law, one of deservedly high standing as a senator and advocate, was the leading counsel for the defence, for which he received, with his brief, a fee of *three hundred guineas*, and an additional five guineas for every day engaged after the first day; of course the attorney must be in attendance during the whole of the trial; and, for each day so occupied, deprived of every chance of earning one single shilling elsewhere, he would be allowed only *one pound*, and to render the matter more truly absurd, the learned serjeant's clerk was paid five per cent. upon the amount of his master's fees, for the immense trouble of taking in the brief, and receiving the money, and taking care of the chambers, and the gratuity so given to the clerk for no trouble whatever would be allowed upon taxation; so that, assuming the trial had lasted but one day, the counsel's clerk would pocket *fifteen pounds fifteen shillings*, and the attorney *one pound*; of course the attorney in that matter got better compensation, or sad, indeed, would be the reflection upon the client who had so rewarded the great ability and untiring zeal of one so eminently an ornament to his profession, however painful might be the battle he had to fight, or its miserable result.

"The non-legal reader will be soon able to understand why lawyers' bills carry in the total frightful figures; he will see that the amount is not, as is often jocularly said, *all profit*; the payments out of

pocket are enormous, and must be made in cash down. Counsel give no credit; if an attorney owes a guinea, his life is hunted out, unless he pays it. The officers of the court give no credit—they cannot: the attorney is the only one to give credit, and he, in the exercise of a fellow-feeling, often suffers a loss because his client may have been over-reached and plundered. Debase not, abuse not, the deserving man who devotes his days, *and nights, too*, to the service of him who has intrusted his interests, his hopes, and expectations to the care and protection of a high-minded, intellectual, and talented member of the legal profession, but rather join in reprobation of a system that has for its object a miserable reward for duties well discharged, assessed by one who, under the cover of discretionary powers and a large salary, pays more regard to quantity than to merit, and stultifies all argument by referring to a prevailing rule, which gives a fixed fee for an item not worth a fifth part, and no more than the same fee for hours of trouble and labour; substantially worth five times the amount allowed. Why should the suitor pay for work existing in fiction, or next to worthless, and not pay reasonably for labour well bestowed? The system is bad—it disgraces the court, the officer, and the attorney; it has a canker about it, and requires eradication by a sharp knife, and a steady, experienced hand. It *can* be done, and because it *can* be done, it ought to be done, and by that means remove one of the pernicious uses and abuses of the *superior courts of common law*!!

In chap. 3, the writer gives an amusing account of a sale by auction, in which the respective parts of an auctioneer and a puffer are well described, and which ends in one Jacob Stiles becoming the purchaser of a valuable property "only 85 per cent. beyond its value, consisting of a miserable dilapidated building, misnamed a house, with the full quantity of inferior land, having upon it a few stunted oak-trees, fit only for firewood," &c. Then comes a scene with a professional traitor at the auction rooms, which we shall allow "a professional man," to describe in his own language, premising, however, that we think such cases cannot be of frequent occurrence:—"Directly the lot is knocked down, the auctioneer politely inquires the name of the purchaser, which, being given, the dealer in the general line is invited, by a smirking gentleman seated below the rostrum, to sign an agreement, ready printed at the foot of a particular and condition of sale, expressive of the fact that Jacob Stiles has, by public auction, become the purchaser of the estate mentioned in the particulars, at the sum of £350, subject to the conditions of sale, and that he has paid £35 by way of deposit. All this being completed, he is then asked to name his solicitor, to

whom the abstract of title may be sent. Abstract of title and solicitor is all Greek to the vendor of soap, sand, and candles. 'I have no solicitor,' is the answer. 'Have you not?' observes the smiling clerk, 'what a pity! Well, never mind. I will see what I can do for you. Mr. Pluck,' addressing a gentleman in black who *happens* to be conveniently seated, 'how *apropos* that you are here. Mr. Stiles wants a solicitor to carry out this little purchase. I am sure you will do it at as little expense as any one.' 'Certainly,' observes Mr. Pluck, patronisingly, to Stiles. 'We don't want to waste money in these days. Economy is my motto in all things.' 'How much do you think it will cost me?' inquires Stiles. 'Cannot say, exactly,' is the reply; 'depends so much upon circumstances.' 'Will you fix a figure, Sir?' anxiously asks Stiles. 'A figure, my dear Sir! A figure?' indignantly remarks Mr. Pluck. 'Listen to me, Sir; did I not say economy should be the order. My reputation, even with my friend here (looking at the clerk), is worth something. *Never trust a lawyer who stoops to a bargain. No respectable office will do it.* I, Sir, am above such practices. I expect to be paid for services usefully rendered, and that is all. You live by your business, and I hope to do so by mine, and that is the extent of my requirements.' This argument becomes too much for Stiles, and he succumbs, simply observing, 'You will do it as cheap as you can, Sir,' and the other replying, 'depend upon it I will not incur one shilling expense not warranted by the rules of the profession to which I have the honour to belong.'

"The gudgeon has taken the bait, it is true, but he is not yet hooked. The auctioneer's clerk knows he will have a *feeling* out of the transaction, as between himself and his friend Pluck; he therefore must do his part to secure the client. 'Mr. Stiles,' he observes, 'here is the duplicate of the contract signed by the vendor's agent. It is my business to give it to you, and you can give it to whom you please,' looking hard, and inclining his hand to Mr. Pluck. 'I shall want it, Mr. Stiles,' observes the lawyer, 'to consider the conditions.' 'Certainly,' says the clerk. 'Of course,' says Stiles; and he hands the instrument, the only evidence he has of his contract, to Mr. Pluck, and that fact puts beyond doubt the relation of solicitor and client, and within one hour from that time two fees stand upon the lawyer's books to the debit of the dealer in the general line: Attending taking instructions, and attending at the Stamp-office to get agreement stamped; amounting, together, to one pound.

"The gudgeon is now hooked. Jacob Stiles is exposed to be again plundered, because he may, perchance, have picked up a hanger-on of an auction-

room, a class of beings who, without character or principle, frequent all public rooms, courts, offices, and prisons, seeking whom they may devour, and who take from miserable humanity the last shilling that can possibly be raised, under the pretence that it is to be applied to some imperative call, existing only in the fertile imagination of the plunderer; or, if a cause should exist, it is seldom, if ever, applied to the purpose for which it has been provided.

"Having placed the purchaser of an estate at public auction in the hands of his legal adviser, I shall dismiss from further consideration the circumstances under which they were introduced to each other, and treat the matter as an every-day business transaction; premising, that my pages are not written exclusively for the information of those learned in the law, because I feel that would be an act of supererogation on my part, although some men in that department may not have had a great deal of experience, and, therefore, it may be possible for such men to collect a few crumbs of knowledge for their future guidance. My aim is universal, and intended to inform, I hope successfully so, the citizens of the world generally; and if I succeed in one single reform, I shall be much gratified; but to proceed.

"The solicitor having possessed himself of the *particulars and conditions of sale*, peruses the latter with extraordinary attention, and he finds that great care has been bestowed, so as to meet impossible, as well as possible, objections to title, and to shut out all chance of enabling an unwilling purchaser to escape from his contract; and some of them are so ingeniously framed, as actually to let in the probability, that in the course of the completion of the transaction, the man who sells may claim from him who buys part of the expense attending the manifestation of the right to sell *at all*; this may appear, to the non-legal reader, almost an anomaly, or a robbery, or an absurdity; but nevertheless it is so, as I shall presently show.

"We left the solicitor considering the conditions of sale, and before he allows himself to proceed one step further, he must have an interview with his client; he therefore writes to him to attend at a given hour the following day; in the meantime he is furnished by the vendor's solicitor with an abstract of title; he dips but a very little way into the bundle of papers he has been supplied with, and to his mind confusion becomes more confounded; he finds the property, not a great many years since, had formed part of a large baronial estate; he drops the papers in utter despair, because he admits to himself the consideration of such a mass of complication exceeds his intellectual and legal attainments. The morrow comes, and so does the client; the solicitor opens with a perfect broadside.

"My dear Sir, what have you been about? oh, that you had seen me before you went to the auction mart. It is awful."

"What do you mean?" says the terror-stricken client.

"Mean," replies the lawyer, "why your purchase is worse than an investment in the Royal British Bank, or in Russian railway shares."

"Pray explain, Sir," urged the unlucky purchaser. "What is the difficulty? at worst I can only lose my deposit." "Nonsense, man, the conditions are too stringent for that; the ninth condition declares, that if the purchaser fails to complete his contract within the time fixed upon, he shall forfeit his deposit-money to the vendor; but that is not all, for he is to be at liberty to re-sell in any way he pleases, and the loss occasioned by the second sale is to be paid by you, as ascertained and liquidated damages. Another condition provides that *you are to pay the vendor's solicitor* for all searches and certificates of births, marriages, and deaths, and evidence of intestacies, indentities, administrations, office-copies, and the Lord knows what else, and what it will amount to is beyond my comprehension."

"But nothing of the kind may be wanted, Sir," remarked poor Stiles.

"Wanted, indeed," replied Mr. Pluck, "I pity your ignorance; look at that mass of paper (pointing to the abstract), full of such things. The pedigree and title of Lord Wasteall." "What is to be done, Sir? I don't understand such things, and you do," observed the frightened client. "You ask me, Mr. Stiles, a plain question. *What is to be done?* A desperate disease requires a desperate remedy. Hand me over £10, and I will lay the abstract before a shrewd conveyancer of my acquaintance, with instructions to advise an *unwilling* purchaser, and if there is a defect, he is the man to find it out, and by that means you may get out of the contract altogether." This was agreed upon, and the abstract went to the conveyancer accordingly.

"In a few days it was returned with an advising opinion, to the effect that the third condition precluded the purchaser from calling, except at his own expense, for any evidence of title anterior to the vendor's purchase deed; that deed being little more than twenty years old, did not in his opinion afford a possessory title under the Limitation of Action Act, because there might exist legal disabilities, such as absence beyond seas, marriage, infancy, or lunacy—Mr. Stiles ought therefore to avail himself of a portion of the ancient title, beginning with the settlement upon the marriage of Lord Wasteall, in 1805. There would be but little difficulty in tracing the issue of *that marriage*, if any had ever existed; and should that discovery be

made, the trustees had no power to sell, and, consequently, there would be a *fraudulent assumption of title upon the face of the abstract*, and the contract might then be rescinded. Upon the whole, he would advise the purchaser, having regard to the smallness of the purchase, to expend a few pounds in the necessary inquiries amongst the old tenants of Lord Wasteall. Obtain from one of them a statutory declaration of the non-existence of issue of that marriage, bearing in mind the growing security by lapse of time arising from adverse possession, and, in case of sale, to take care to protect himself by equally stringent conditions.

"Mr. Pluck's mind was amazingly relieved by the opinion. He lost no time in sending for Mr. Stiles, who readily concurred in the propriety of the latter portion of the advice. Mr. Pluck took a country trip, and after being absent two days returned with the necessary evidence. The perusal of the voluminous abstract, and the instructions to the conveyancer, and the payment of his fee, exhausted poor Stiles' £10, and left him debtor to Pluck a further £10 at least, independently of the country trip, in respect of which the generous solicitor may, probably, in the winding-up of the matter, make some allowance."

The writer then gives a description of the preparation and settlement of the conveyance, for which we have not now room, though, perhaps, in a subsequent number we may give his remarks, as they are open to observation, and will, we think, be easily shown to be erroneous. In fact, the writer is possessed with the mania now getting so common that deeds contain, for the greater part, unnecessary matter, and that the recitals, covenants, &c., may be safely and properly dispensed with. But we would warn the practitioner against following such advice, and we are satisfied, as before stated, that the more judicious course is to shorten the present forms as far as consistent with safety, rather than reject them altogether. And especially should a solicitor be cautious in this respect, for otherwise he may find that he is incurring a personal risk which his client may be only too happy hereafter to avail himself of: if any such alterations are to be adopted, let the irresponsible part of the profession—the counsel learned in the law—set the example; but this is not likely to happen, as the latter are too well aware of the value of recitals and covenants.

THE BAR AND THE PRESS.

Lawyers must always be unpopular in a community whilst there are rogues among the latter, and this for a very obvious reason. The press, too, is rather jealous of the prerogatives of the bar, espe-

cially when the latter, in the discharge of their duties, find it necessary to mention either the press collectively or any of its writers. Thus a complete ferment has been created by a remark made by Mr. Edwin James in the course of the recent disgraceful trial of Lyle v. Herbert. In commenting upon the evidence of one of the witnesses, in connection with a revoltingly absurd mechanical figment which had been devised, and called an "indicator," Mr. James took occasion to say that a man's giving evidence in a trial for adultery was no reason for his being discredited as a witness, for that one of the most eminent statesmen of the day, a person as distinguished by his talents as by his social position, had some years since undertaken a voyage to Italy for the purpose of collecting evidence to enable a certain noble duke to obtain a divorce from his wife. The statesman here alluded to was Mr. Gladstone, who, it will be remembered, gave evidence before the House of Lords in the melancholy divorce case of the Duke and Duchess of Newcastle, then Lord and Lady Lincoln. Mr. Gladstone, in his place in the House of Commons, distinctly denied that he had taken any journey for such a purpose, that he had gone out of his way to collect any evidence, or that he had done any more than give, as he was compelled to do, such evidence before the House of Lords as he had involuntarily become possessed of. Mr. Edwin James writes to Mr. Gladstone, to inform him that his speech at the trial is inaccurately reported; that he never intended to institute a parallel between the disreputable "indicator" witness and the author of the article on Homer in the last number of the *Quarterly*; and that the sentiment which he intended to convey to the jury was, "that a man of the highest position and most unsullied honour might, from feelings of friendship and from the most sincere motives, lend assistance to another in procuring the evidence essential to obtain a separation from the wife who had dishonoured him, and who he believed was no longer worthy to bear his name." Mr. James suggested that it was due to himself and to Mr. Gladstone that the latter should read this letter in his place in the House of Commons. The ex-Chancellor of the Exchequer replied, refusing to accede to Mr. Edwin James's request.

So far the matter might have been supposed to have come to an end; but in step the press, and indulge in a series of injurious attacks on Mr. James, and not content with that the whole bar is arraigned by these voluntary champions. One writer thus discourses:—"An end, as far the chief actors are concerned, but not so with those troublesome inquirers who are apt to endeavour to draw morals from all things. The moral we draw from this correspondence is, that in Mr. James's proceed-

ings we have another instance of that daily-increasing evil—the licence of the Bar. It must be plain to all that Mr. Edwin James distinctly reiterates that which Mr. Gladstone emphatically denies; and his asking the latter gentleman to read a letter containing that reiteration in his place in Parliament is about as cool a proceeding as that of the soldier at Rochester, of whom Mr. Dickens tells us in ‘Pickwick,’ and who, being refused more liquor by a barmaid at a tavern, drew his bayonet and wounded the girl in the arm, but came down the next morning, and in the most friendly manner expressed his willingness to look over the matter and say no more about it, if she would stand another glass. Not that, in *re Gladstone*, Mr. Edwin James offers by any means so very gross an instance of bar-licence. Every trial at an assize town, every argument on an election petition, every cause in Westminster Hall, furnishes us with abundant samples of the coarse vituperation, of the cowardly bullying of defenceless witnesses, of the sorry jestings, the unwarrantable deductions, and the unfair arguments which many of our leading counsel seem determined to substitute now for the learning, the eloquence, and the wisdom of the bar as it was. It would seem as though the spirits of the old bullying judges—the Jefferys and Bartholomew Showers, and, at a long distance it must be admitted, the Ellenboroughs and Bayleys, expurgated from the bench, had taken refuge within the bar. Statements are made respecting absent individuals, often reflecting in the most serious manner upon their private character; questions are addressed to witnesses which are as impertinent as they are illegal; and the most unjustifiable attempts are made to coerce not only the witnesses but the jury. The position of an English advocate is one so honourable and full of such weighty responsibility that it must be a matter of poignant regret to all who wish to see righteously administered the purest and noblest code of justice in the world, that the forensic profession should number among its members barristers who convert the recognised liberty of the bar into licence.”

DEBATING SOCIETIES.

THE BIRMINGHAM LAW STUDENTS' SOCIETY.

August 19, 1857.—Moot Point, No. 229.

A., at the request of B., pays to C. a sum of money lost by B. to C. at an illegal game. A. having a full knowledge of that fact, can A. recover the amount from B.?

It should be observed that at common law all gaming and wagering was regarded as lawful so long as it did not militate against the rules of public morality, public policy, or public decency. Under

this state of things the Legislature interposed, and by a statute passed in the 33rd year of Henry the Eighth, defined such games as tennis, dice tables, cards, bowls, clash, coyting, &c., to be unlawful, and imposed certain penalties therein named. This was followed by the 12 Geo. 2, c. 28, prohibiting lotteries, and the games of ace of hearts, pharoah, bassett, and hazard; by the 13 Geo. 2, c. 19, prohibiting passage and all other games with dice (except backgammon); and by the 18 Geo. 2, c. 84, prohibiting the game of rolypoly or walet. The above statutes having declared certain games unlawful, the Legislature again, in order to defeat any security given for money won at gaming, passed the following acts:—16 Chas. 2, c. 7; 10 Will. 3, c. 1; 9 Anne, c. 14, and 11 Anne, c. 1; and thus rendered such securities void.

Mention should also be made of the act 19 Geo. 3, c. 37, and 14 Geo. 3, c. 48, prohibiting wagering policies on ships; the Stock Jobbing Act, 7 Geo. 2, c. 8, and the recent act, 8 & 9 Vic. c. 109.

The moot point of course involves any one of the above prohibited games, the question being argued mainly in connection with the following cases—*Alcenbrook v. Hall* (2 Wils. 309), that an action lies to recover money paid by the plaintiff at the defendant's request to a person to whom the defendant had lost the amount on an illegal bet upon a horse-race. *Bargean v. Walmsley*, 2 Strange's R. 1249). Not illegal to lend money to a party for the purpose of his paying a gambling debt. These two cases are clearly in support of the affirmative. Then follows *Oanan v. Bryce* (8 B. & A. 179), where it was held that money lent for the purpose of settling losses on illegal stock-jobbing transactions could not be recovered back, and by *M'Kinnell v. Robinson* (7 L. J. R. Ex. 149), that money lent for the purpose of playing an illegal game cannot be recovered back. From the judgment of the court in the last case, *Alcenbrook v. Hall* and *Bargean v. Walmsley* may be considered as overruled. There is also *Webb v. Brooke* (3 Taun. 6) in the negative, *Knight v. Cambers* (24 L. J. R. C. P. 121), and *Oulds v. Harrison* (same vol. Ex. 66),—arguments on the pleadings as to the operation of 8 & 9 Vic. c. 109, in connection with stock-jobbing transactions, which that act merely renders void, and not illegal. By *Varney v. Hickman* (17 L. J. R. C. P. 102) money deposited with a shareholder to abide the event of a wager on a trotting match may be recovered back before payment to winner (see also *Martin v. Hewson*, 24 L. J. R. Ex. 174).

From a reference to the above cases and others on the subject, it is now pretty well established that any contract springing from an illegal transaction with notice and in aid thereof, will effectually pre-

clude the party lending his money from recovering again in an action for money paid.

The meeting decided in the negative.

A. FREDAY, Corresponding Secretary.

LAW STUDENTS' MUTUAL CORRESPONDING SOCIETY.

The objects of this society are to provide a universal system of intercommunication amongst the law students of this kingdom, and by that means enable them to render mutual assistance in their studies, and so promote feelings of friendship and unanimity between themselves, and stimulate their exertions in preparing for the honourable profession of the law.

The society consists of honorary and ordinary members. Honorary members being barristers, attorneys, and solicitors, or any other gentlemen connected with the profession, who become donors of half-a-guinea. Ordinary members being articled clerks, who shall contribute an entrance fee of 2s. 6d., and an annual subscription of 2s. 6d.

Fourth Annual Report of the Committee, presented to the Members, April 9, 1857.

It is with pleasure your committee are enabled to announce in this their fourth annual report, the continued success which has attended the operations of the Law Students' Mutual Corresponding Society during the past year; and placed upon a still firmer basis such a systematic means of intercommunication between the junior members of the profession as cannot fail to prove most beneficial to those who may avail themselves of the advantages it offers.

The society now consists of nearly 100 honorary and ordinary members; a considerable increase since last year, notwithstanding the secession of many of the older members from the ranks of the society, their terms of articles having expired, and the active duties of the professional life into which they have entered rendering it impossible for them to devote the requisite time and attention to the papers of the society. It is, however, most gratifying to your committee to state that in nearly every instance of withdrawal they have received letters speaking in the highest terms of the great advantages derived by the writers, whilst members of the society; one of the most convincing proofs that it is really a most material assistance to the articled clerks in their studies, and most deserving of their support.

The growing importance of the society has been manifested during the past year by the establishment of a quarterly journal circulated amongst the members, containing, in a digested form, the most important discussions of the society, besides other

articles of utility and instruction to the law student; and your committee cannot here omit to express on behalf of the society their warmest thanks to those gentlemen who have undertaken the labour of preparing and editing the contents of the journal, which your committee feel will be productive of immense advantages to the members of the society.

Your committee regret that the steps taken to organise a London section of the society, for *viva voce* discussions, did not meet with that encouragement which had been anticipated, and that the meetings were in consequence discontinued; they hope, however, at some future time to see the section revived, and would earnestly recommend the consideration of such a course to the members of the society now residing in the metropolis.

Your committee deem it advisable to draw the attention of those articled clerks who are not at present aware of the existence of the society, to its principal features and objects. It is designed—first, as a means of friendly intercourse, and for the purpose of engendering feelings of unanimity and friendship amongst articled clerks generally throughout the kingdom; secondly, to supply the wants of a Debating Society in small towns by affording a medium for the written discussion of moot points on legal subjects, and the composition of essays; and thirdly, by the same means, to furnish opportunities to the student to apply principles to practice, and thus assist him in obtaining a practical knowledge of his profession; and your committee feel justified in asserting that every member who, actuated with an earnest desire for self-improvement, will give his full attention to the papers of the society, cannot fail to acquire an extensive and varied knowledge of the law.

With regard to the financial position of the society, your committee feel pleasure in stating, that after defraying all the expenses of the past year, an ample balance remains to the credit of the society.

For the Committee,

CHARLES R. GILMAN, Hon. Secretary.

Norwich, August, 1857.

MOOT POINTS.

No. 9.—*Will—Power to Sell.*

Testator, by his will dated in 1793, gave unto his wife certain real estates in B. during her life, and after her decease. "His will was that the said real estate should be sold, and the money arising from such sale to be divided amongst his children A. B., C. D., E. F. (a feme covert), and G. H., in equal portions;" and he appointed his wife his executrix. The wife died after the testator, but without having

proved the will. By indentures of lease and release, executed in 1810, after reciting in the release the above-mentioned facts, and that the will was intended to be forthwith proved in the Consistory Court of L., by A. B., the eldest son of the testator, as administrator *de bonis non*, with will annexed, the said real estates were conveyed by the said A. B., C. D., E. F. and her husband, to G. H. in fee. By a recital in a more modern deed, it appears that the will was, subsequently to the conveyance to the said G. H., proved by him in the Prebendal Court of B., as administrator, with will annexed. Is the title a good one? I think it is. There is no donee named in the will to exercise the power of sale, and it is contended, on the authority of *Bentham v. Wiltshire* (4 Madd. 44), that such power would not vest in the executrix. If this view is correct, A. B., the heir at law, would be the proper person to convey. If any correspondent thinks the point worthy of his attention, I shall be obliged by his opinion. M.

No. 10.—*Surveyor of Highways—Books.*

The surveyor of a highway lost a book which contained entries of his receipts and payments as surveyor, and which he was bound to deliver up to his successor in office pursuant to 5 & 6 Will. 4, c. 50, s. 42. This he was required to do, but failed in doing, and was, therefore, summoned before the magistrates, and fined £5 and costs, which he paid. Afterwards he was again required to deliver up the book, and having made default in so doing, was a second time summoned before the magistrates, and fined £5 and costs. Have the magistrates power, under 5 & 6 Will. 4, c. 50, s. 42, to convict a second time?

W. B. C.

No. 11.—*Bankruptcy—Creditor's remedy.*

A., B., and C., carrying on business together as engineers, dissolved partnership as far as A. was concerned, and notice of dissolution was advertised in the *Gazette*, and A. assigned his effects in the partnership to B. and C., who continued the business in partnership, and covenanted with A. to pay and satisfy the debts and engagements of the old firm. B. and C. becoming bankrupts, have the creditors of A., B., and C. any and what remedy against the partnership effects of B. and C.? or, if not, what remedy have they?

P. G. A.

No. 12.—*Married woman.*

A., a married woman, is living apart from her husband, who has spent all he possessed, and is unable to maintain her. A.'s friends refuse to assist her, and she is at present almost destitute; she will, however, be entitled to a considerable property, which has been settled to her separate use, free from

the debts and control of her husband, and with a clause against anticipation, on the death of her father. Under these circumstances, A. applies to B. to advance her money for the purpose of procuring necessaries, which B. does, and takes her promissory note as a security. Is A. or her husband, or both, or will A.'s separate estate, on falling into possession, be liable for the repayment of the amount so advanced? And is the promissory note signed by A. of any force whatever? A few cases, with correspondents' opinions, will be acceptable. Z.

THE MONTH'S SUMMARY.

Conveyance to Burial Boards—Inrolment not requisite.—In an article in the *Jurist*, the question is considered, whether conveyances to burial boards of lands purchased by them for the formation of burial boards require to be inrolled under the so-called Mortmain Act, the 9 Geo. 2, c. 36; the answer is in the negative, though it is admitted that there are *dicta* in several cases which afford ground for a different conclusion, especially if the provisions of the Burial Board Acts were not too strong to be got over. The 25th sec. of the 15 & 16 Vic. c. 85 (for regulating burials in the metropolis, extended to the country by the 16 & 17 Vic. c. 134), enacts, that "every burial board *shall*, with all convenient speed, proceed to provide a burial ground for the parish or parishes for which they are appointed to act, and to make arrangements for facilitating interments therein;" thus making it imperative on the board to provide a burial ground. To facilitate the doing this, the 27th section incorporates the greater part of the Lands Clauses Consolidation Act. Among the sections so incorporated is the 7th, which enlarges, in the most extensive manner, the powers of parties disposed to sell to "the promoters of the undertaking"—i. e., to the board. It enables trustees, tenants for life, and others, to sell and convey to the board, thus giving them a statutory power to sell what is not their own; and this section has received a liberal construction, for an instance of which see *In re The Cuckfield Burial Board* (18 Beav. 153). It would be a singular state of things if these extraordinary statutory powers to convey to a particular class of charitable bodies should be held subject to a restriction on the right to convey to charity generally. But the matter does not rest here. The 81st section, which is also incorporated in the Burial Act, enacts, that "conveyances of lands to be purchased under the provisions of this or the special act, or any act incorporated therewith, may be according to the forms in the Schedules (A.) and (B.) respectively to this act annexed, or as near

thereto as the circumstances of the case will admit, or by deed in any other form which the promoters of the undertaking may think fit; and all conveyances made according to the forms in the said schedules, or as near thereto as the circumstances of the case will admit, shall be effectual to vest the lands thereby conveyed in the promoters of the undertaking;" and it then goes on to provide, that such conveyances shall have certain further effects beyond those attending an ordinary conveyance. Now, the form of conveyance which the Legislature declares shall effectually vest the land in the board will be found, on referring to the Schedules (A.) and (B.), to be a deed-poll; but stat. 9 Geo. 2, c. 36, requires that conveyances to charities shall be "by deed indented." It is therefore impossible to make the two acts completely work together. The Legislature has provided, in express terms, that a burial board may take land by a deed of a certain description, which does not comply with the requisitions of the 9 Geo. 2, c. 36. It would be absurd to say that it is requisite to inrol these deeds-poll under that statute; for, as they are not indentures, they would not satisfy its provisions if they were inrolled; and there is no trace of intention that they should be. Had the act intended them to be in any way inrolled, it would no doubt have said so; and in the case of copyhold lands it has so done. Now, the Legislature does not require any particular formalities to be observed as to these deeds-poll; nothing is prescribed as to them which can be supposed to be intended as a substitute for inrolment; and it would be difficult to hold, that, if the board take a conveyance by deed-poll, they need not inrol it; but that if they take one by indenture, it must be inrolled. We think, therefore, that the intention of the Legislature, that conveyances to burial boards on sales to them should not require inrolment, is sufficiently expressed. The cases of *Mogg v. Hodges* (2 Ves. sen. 52) and *The British Museum v. White* (2 Sim. and S. 595) have been referred to as decisive in support of the contrary view, but we do not think that they are so. The special acts in those cases appear to have been merely intended to take away the disability of a corporation to hold land without a license in mortmain, and not to have been directed at exempting other parties from their inability to give land to it, except in a particular way. Those cases turned on gifts by will, and we do not mean to lay down that a gift by will to a burial board would be good. It might, perhaps, be held that it is so, on the principle of *The Attorney-General v. The Haberdashers' Company* (1 My. and K. 420); but whether that be so or not, a gift by will, or a voluntary gift by deed, stands on a materially different footing from a sale.

The fund out of which the burial ground is to be purchased not being a charitable fund (*The Attorney-General v. Heelis*), if the board buys for value there is no charity in the case; but if a free gift is made, bounty is for the first time introduced, and it is by no means clear that the gift is not charitable. We may add, that the question has lately been before a conveyancer of the very highest eminence, and that he gave an opinion, founded on reasons substantially identical with the above, to the effect that inrolment was not necessary.

Restraint on alienation of chattels.—Chattels personal are transferrable to the full extent of the owner's interest; an assignment prohibiting a future disposition is void.

Feme covert—Separate use—Restraining alienation.—A feme covert cannot, in general, transfer chattels personal, they being, except where settled or given to her separate use, the property of her husband; and when settled or given to a feme covert's separate use, she may be restrained by the deed or will from alienating them.

Notice, constructive—What is—Notice to solicitor not.—Constructive notice is as good as any notice if it does amount to notice; that is not the meaning of constructive notice, that it was only notice to the solicitor of the party. Positive notice to the solicitor I must consider positive notice to the client (Per Lord Chancellor in *Cooks v. Lee*, 23 Law Journ. Ch.)

Stoppage in transitu.—If a purchaser becomes insolvent before the goods reach him (not having paid for same) the vendor may stop them in their passage; this is called stoppage *in transitu*, and cannot be done as against the indorsee for value of the bill of lading.

Equitable conversion [ante, p. 43]—Land directed to be sold—Entire or partial failure of gift.—Land directed to be sold will sometimes be personal estate even in the hands of the heir, though his claim must originally attach to it in the character of real estate. The distinction seems to be that where the disposition for the purposes of which the conversion is directed to be made wholly fails, the property is real estate of the heir, and on his decease would devolve to his real representative; but where there is a partial failure only of those purposes—as where the heir takes by lapse or otherwise an aliquot share or an interest ulterior to that of a legatee for life—the property forms part of his personal estate since the conversion directed by the will would still be required *quoad* the other undivided share or the interest for life in respect to which the will takes effect (*Wright v. Wright*, 16 Ves. 188; *Smith v. Claxton*, 4 Madd. 484.)

THE STATUTES OF 19 & 20 VIC.

We have already noticed the statutes of the 19 & 20 Vic., yet so important is it that every professional man should be well acquainted with recent enactments that we make no apology for calling attention to some of the more important statutes of that session; and, in so doing, we avail ourselves of a summary contained in the last report of the Incorporated Law Society.

1. *Leases and sales of settled estates* [vol. 3, pp. 105—111, 169, 209, 214; *ante*, p. 48].—The Leases and Sales of Settled Estates Act, 18 & 19 Vic. c. 120, by which the jurisdiction of the Court of Chancery has been enlarged, for the purpose of affording relief in a large class of cases relating to settled estates. The parties interested in such property are thus enabled to make arrangements for their mutual benefit, in cases which, from the moderate amount of the property, did not justify an application to Parliament.

2. *Intestates personal estates—Administration* [vol. 3, p. 178].—The Intestates Personal Estates Act, 19 & 20 Vic. c. 94, is also a beneficial measure by which the special customs in the cities of London and York, and other places, have been abolished, and this branch of the law has been rendered uniform.

3. *Crossed cheques* [vol. 3, p. 210].—In this department may also be classed the Drafts on Bankers Act, 19 & 20 Vic. c. 25, enabling the drawers to limit the payment of crossed cheques, thereby rendering more secure the payment of money to the right parties. In the advantages resulting to the public from these measures, the members of the profession, in some degree, participate, either by the increase of business, or by the removal of difficulties or responsibilities in transacting it.

4. *Extension of county courts* [vol. 3, pp. 69—80, 207, 213].—A further extension of the jurisdiction of the county courts was effected by the 19 & 20 Vic. c. 109. Actions may now be tried in these courts, even on questions of title, to any amount by consent, and when reduced by set-off under £50. Summonses may be issued against persons out of the jurisdiction where the cause of action arose within it. If the sum in question be above £20, the defendant must give notice of his defence; and where the judgment exceeds £20, the plaintiff's consent is requisite to an order for payment by instalments. No costs on a judgment by default under £20 in the superior courts are allowed unless by order of the judge. By a rule of all the common law courts, if judgment be signed by default, the plaintiff having given notice on the writ, may apply to a judge for his costs; and if, before judgment, the defendant

does not give notice that he intends to oppose, the judge will sign his name on the writ, which operates as an order for costs, and thus the expense of summonses and judges' orders is saved (*ante*, p. 19). The metropolitan county courts are now deemed one district, and summonses may be issued either in the plaintiff's or the defendant's district. On issuing a *certiorari* to a superior court, security must be given for the amount claimed and costs. Amendments have also been made in proceedings by *mandamus* and prohibition. The provisions of the Bills of Exchange Summary Procedure Act are made applicable to the county courts. The scale of costs in these courts is now authorised to be settled, with the Lord Chancellor's approval, by five of the county court judges, instead of, as previously, by the judges of the superior courts; and where the taxation is between attorney and client, and costs are claimed beyond the scale, the consent of the client must be proved in writing. Such is an outline of the further steps in advance made by these courts, which, bearing the name of county courts, were by the first act of 1846 expressly described as "Small Debt Courts."

London Small Debts Act.—It may not be immaterial here to remind the profession that, in the City of London Small Debts Act, 15 Vic. c. 77, there are two sections—119 and 120—which are inconsistent; the one compelling a plaintiff to bring all actions up to £50 in the City court, the other limiting it to £20; and notwithstanding this inconsistency, the Court of Common Pleas, in the case of *Castrique v. Page* (18 C. B. Rep. 458), decided that the 119th section was not repealed by the 120th, and the plaintiff loses his costs absolutely unless the judge certifies, under the 121st section, that there was sufficient reason for bringing the action in the superior court. It is, therefore, proposed that the 119th section of the City Act should be repealed, and the powers of that act assimilated to the jurisdiction of the other courts for the recovery of small debts.

5. *Joint-stock companies* [vol. 3, pp. 175, 211].—The Joint-Stock Companies Act, 19 & 20 Vic. c. 47, comprises the important enactments relating to the limited liability of the partners or shareholders in a large class of such companies, and provides special regulations for their management, with safeguards in their practical operation and the security of their creditors. This alteration in the law was mentioned in the speech from the throne as one which would afford additional facilities for the advantageous employment of capital, and thus tend to promote the development of the resources of the country.

6. *Mercantile Amendment Act* [vol. 3, pp. 210, 212].—The Mercantile Law Amendment Act, 19 & 20 Vic. c. 97, effected several alterations; amongst

which were the protection of the title to goods before they have been actually seized or attached under a writ against the vendor, and as to the specific delivery of goods sold. It abolishes the necessity of stating in writing the consideration for a guarantee; and gives to a surety, who discharges the liability, a right to an assignment of all securities held by the creditor. It also contains several provisions relating to the limitation of actions, especially where there are joint debtors, some of whom are abroad, and as to part payment by one of several contractors. Provisions are also made regarding the acceptance of inland and foreign bills, and the claims for the repair of ships.

7. *Foreign Evidence Act* [vol. 3, pp. 179, 209].—The Foreign Evidence Act, 19 & 20 Vic. c. 113, provides for taking evidence in relation to civil and commercial matters pending before foreign tribunals.

8. *Stamps on articles* [vol. 3, pp. 111, 112; *ante*, pp. 35, 36].—The Stamp Act, 19 & 20 Vic. c. 81, relates to the article clerks of attorneys, enabling the £80 stamp duty on articles to be paid at any period during the clerkship, subject to a penalty proportioned to the time when the tax may be paid.

9. *Counties and boroughs police* [vol. 3, pp. 116, 118, 202].—The Counties and Boroughs Police Act, 19 & 20 Vic. c. 69, which was long under the consideration of Parliament, is also noticed in the Queen's Speech, as adding to the security of persons and property, and affording increased encouragement to the exertions of honest industry.

NOTICES OF NEW BOOKS.

ROMAN CIVIL PROCEDURE.

A Historical Sketch of Civil Procedure among the Romans. By J. T. ABDY, LL.D., Barrister-at-Law, Regius Professor, &c. Cambridge: Macmillan and Co.

Whether for good or for evil, there can be no doubt that the study of the Roman law is becoming more general among English lawyers, and is seeking to recover the ground which in former times it lost in this country. We have little fear that it will usurp any undue favour except with those who are mere students, for the practical English lawyer is little likely to be enamoured with a system so different from that which, for so many years, has been in operation, and which, if it has had its faults, is fast assuming a more satisfactory character. Whether the study of the Roman law would make a more scientific race of lawyers may be doubted; but we feel little doubt that it would fail to make more dexterous practitioners. However, our intention is rather to let the author speak, than to give any

opinion of our own—more especially as we pretend to little acquaintance with the institutes, digest, or code. Mr. Abdy thus speaks of his labours: "My original aim was to dwell upon the historical features in this branch of their legal institutions, and to exhibit its steady progress from the ancient rude symbolism of the twelve tables, to the more complex technicality of the imperial code, rather than to attempt to make a treatise on actions at law.

"But as I advanced in my task, I found many points requiring special notice; and though the labours of Heffter, Savigny, Zimmern, Walther, and Ortolan had cleared away the difficulties, and left little or nothing that was new for a writer on this part of Roman law to speak of, yet the inaccessibility to many persons of their works, and the quantity of matter contained therein, induced me to seize upon a few salient points, and exhibit them in an English dress.

"Of these topics the most noteworthy to my mind were the separation of the legislative and judicial functions of the chief magistrates at Rome, the peculiar position of the *Judex*, the influence of equitable remedies on the *Jus civile*, the history of Interdicts, and the change in the character of appeals and mode of bringing them; most noteworthy, because they belong really to the history of the Roman people, and emphatically mark those elements of their character so strenuously insisted on, and so eloquently described by Savigny—viz., the holding fast by the long-established without allowing themselves to be fettered by it; and the quick, lively, political spirit by which the power of their constitution was renovated, so that what was new merely ministered to the development of what was old.

"The chapter on Evidence was added in order to bring together from the pages of Gothofred, Pothier, and Huber some few of the leading principles on which this part of the Roman law of procedure was based, that by this means might be exhibited, not only the contrast between the system of that people and our own, but the peculiar advantages which Roman jurisprudence, by reason of its high state of cultivation, affords of serving as a pattern and model for all scientific labours in law.

"Perhaps no period of time could be found better adapted than the present for dwelling upon the doctrines of the Roman law, and insisting on its merits in aid of the development of legal principles. The extensive alterations in our process and forms of pleading, the gradual *rapprochement* of equity to common law, the steady progress that is going on in the removal of those feudal notions that have hampered our law of real property, and overlaid it with technical difficulties, expressed in a jargon as

barbarous as it is unphilosophical, are some among other beneficial changes by which we may hope in time to approximate to that point of excellence ascribed by Savigny to the Roman law, when we shall have a system that may be discovered by plain good sense, not overlaid with intolerable formalities, and narrow pedantry on the one hand, nor too abstruse and complicated for the apprehension of all but a few on the other; a system not purposely confined to a few high priests and patricians, like the *actiones legis* of old, but one approved and appreciated by all, on account of its simplicity and clearness, where the 'theory and practice may be the same, the one framed for immediate application, the other ennobled by scientific treatment, and where we shall see in every principle a case for application, in every case a rule by which to decide it.'

"The remarks of an elegant scholar of our own time (whose writings prove his eminent qualities as a jurist) come in aid of the views here maintained, that the Roman law deserves especial attention and deep study in the present day. 'It is not,' says Dr. Maine, in his masterly essay on Roman law and legal education, 'because our jurisprudence and that of Rome were once alike that they ought to be studied together: it is because they will be alike; it is because we in England are slowly, and perhaps unconsciously and unwillingly, but still steadily and certainly, accustoming ourselves to the same modes of legal thought, and to the same conceptions of legal principle, to which the Roman jurists had attained after centuries of accumulated experience and unwearied cultivation.'

"These are admirable words, the truth and value of which become the clearer the closer we scrutinise the tendency of our modern legal reform; but to two, among the many questions of the day, does the importance of the study of the Roman law most apply—viz., the demand for codification, and the demand for legal education. The difficulties that stand in the way of the first of these questions are many and powerful, not the least of which is what the writer above quoted so forcibly insists upon—viz., the decay of technical phraseology in the English law, and the want of a proper legal terminology, by which a definite and concise expression of legal conceptions may be given; an evil that presented itself as one of such importance to the mind of Mr. Livingstone, as required at once to be removed, and necessitated the addition to his Code of Louisiana of a book of definitions.

"How admirably the Roman law comes in aid of this defect, and what service may be rendered to our legal phraseology by the writers whose technical language is so skilfully exhibited in the pages of the

digest, Dr. Maine has sufficiently shown. But it is in its connection with legal education that the Roman law stands pre-eminently forth. If we are to expect a properly-devised system of codified or well-arranged law, it is too much to ask for minds trained up to the task, and capable of providing for the combination of theory and practice, that must present itself therein? And if what Bacon says be true, that the age in which a code should be formed should exceed preceding ages in intelligence, what answer shall be made to the question, 'Is this such an age, and have we the means at our disposal for such a task?' Can we say that our general mass of legal intelligence is superior to what is past, or can we avoid seeing the inferiority of our own juridical writers to the jurists of neighbouring countries. And when we search for reasons for such a state of affairs, one above all must strike us—viz., the want of a sound legal training for those who are to become the proposers and exponents of the laws of this country.

"For one thing and the other—for legal reform, whatever shape it may assume, and for legal education—the maxims and principles embodied in the Roman law, and the language in which they are framed, undoubtedly are of inestimable value.

"The study of the Roman law will help to bring out that twofold spirit, which, to use Savigny's words, is indispensable to the jurist—the *historical*, by which the peculiarities of every age and every form of law may be seized and appreciated; the *systematic*, by which every notion and every rule may be placed in lively connection and co-operation with the whole.

"In conclusion, let us hope that the time is not only coming, but is not far off, when the phraseology of the statute-book will not be the worse for a rate in aid from its friendly, not rival neighbour, the Corpus Juris, and the champions of Archbold, Tidd, and Chitty will have no cause to fear the utter destruction of these eloquent commentators, although our students are brought up to peruse and admire the learning of Ulpian, Gaius, and Papinian."

ELIZA FENNING'S CASE.

The case of Eliza Fenning is one often referred to as an example of an innocent person unrighteously doomed to death, and, indeed, was so referred to on the trial of Madeleine Smith. The Rev. J. H. Gurney, the highly-respected rector of St. Mary's Church, Marylebone, has written a very interesting letter to the *Times* newspaper, enclosing an extract from the note-book of his uncle, the late Mr. Wm. Brodie Gurney, shorthand writer to the Houses of

Parliament, in which the guilt of Eliza Fenning is shown to have been admitted by herself. This is the more curious, inasmuch as a Rev. Mr. Fletcher had previously communicated to the newspapers a statement that he had attended the deathbed of a baker who confessed himself to be the murderer, and who declared that Eliza Fenning was innocent. The following is the extract from Mr. Gurney's notebook: "Doubts having been on several occasions expressed of the guilt of Eliza Fenning, I feel it my duty to record the facts with reference to her case which came within my knowledge.

"Feeling as strongly as any one can do the objection to the infliction of death by a human tribunal, I still feel that there is a justice due to prosecutors, who are bound conscientiously to speak the truth, and to jurymen, who are sworn to find a verdict according to the evidence, which, in many instances, has been disregarded.

"Having heard from a friend that the master and mistress of Eliza Fenning were esteemed highly respectable and conscientious, I was glad to find that the doubts entertained referred rather to the question whether the evidence, which was circumstantial, established her guilt. The jury and the judges thought it did, and I believe those who were present at the trial pretty generally concurred. In a few days, however, I heard that her strong asseverations of innocence had created a doubt, and that many who visited her felt a strong interest in her case, believing her to be innocent, and a petition to the King was sent in. The grounds of it were examined by the Secretary of State, the attention of the learned judge was called to the case, and on his report, that he felt no hesitation as to the propriety of the verdict, the law was directed to take its course, which it did. Still some persons retained their doubts.

"Shortly after her execution, I heard that the Rev. James Upton, a Baptist minister, preaching in Church-street, Blackfriars-road, had visited her while under sentence of death, having been requested to do so in consequence of her having, when young, attended at his chapel, whether with her family or in the Sunday school I am not aware. I knew him to be a very excellent man—a man of great kindness of heart; I felt satisfied that he would not form a more unfavourable opinion than circumstances called for, and I took an opportunity of seeing him. He informed me that on his entering the cell, Eliza Fenning, with great earnestness and tears, exclaimed that she was innocent of the crime imputed to her—that it was a cruel charge, and so on. That he replied, 'Eliza, I have not come here to talk to you about that. I do not mean to ask you whether you were guilty of that crime or not, but I

come to you as a minister of Jesus Christ, hearing that you are probably very shortly about to appear before your Judge, to remind you that you are a sinner, and that unless those sins which you are conscious you have committed are repented of and pardoned, you can have no good hope for eternity. I come to set before you Jesus as a Saviour able and willing to save.' He said, 'I was somewhat affected, considering the situation of this poor girl about to suffer, and I talked to her earnestly, entreating her to seek mercy, and avoiding altogether the subject of her conviction. Before I had done she was quite melted down, and then it all came out.' I said, 'Do you mean that she confessed that crime?' 'Oh yes,' said he, 'there was no reserve then. She confessed that it was all true, and I besought on her behalf the forgiveness of all her sins, and of that among the rest; and I hoped at the time that she had joined in that prayer, but I understand that after this she still persisted in assuring those who visited her of her innocence.'

SUMMARY OF DECISIONS.

EQUITY AND CONVEYANCING.

ADMINISTRATION SUIT [*ante*, p. 42].—*Calls on shares—Specialty—Distribution of assets—Future calls not to be provided for.*—The following case has been noticed before (p. 42), but its importance will justify repetition. Where the testator in a creditor's suit held shares in a company, the calls on which shares formed specialty debts: Held, that, as against simple contract creditors, no part of the estate could be reserved to provide for future calls. *Wentworth v. Chevell*, 3 Jur. N. S. 806; *ante*, p. 42.

APPORTIONMENT [*ante*, p. 19].—*Rents—Direction to lay out moneys in land—Death of tenant for life after purchase—4 & 5 Will. 4, c. 22, s. 2, set out ante*, p. 19.—V. C. Kindersley, after referring to the preamble of the act just mentioned, stated that the words of it point out what the evil was which was intended to be remedied by the act—viz., that if a person who took a life interest died between periods of payment, his estate lost the benefit of any apportionment. Then comes the enacting part, which appears to refer to the mischief to be remedied; and it seems that the intention was, when it speaks of these rents, annuities, &c., which should become payable under any instrument, it means become payable to a person whose interest was created by the instrument, and I think that must have been the meaning, for it refers, not only to rents which may be created after the act, but it applies also to moduses which could not possibly be made payable

or fall due by an instrument dated after the year 1834. A rent may become payable to a person whose interest is created by an instrument coming into operation after 1834, but a *modus* cannot, although this word is put into a common category with the other words. If, therefore, you give this interpretation to the clause of the act, it is quite intelligible, and is addressed to the evil sought to be remedied. It may be observed that every lease granted by virtue of a power, according to the doctrine of powers, takes effect under the instrument which creates the power; and in the following case the will under which the power was created, was dated before the passing of the act, although the leases under the power bear date after it. It appeared that a testator, by his will, which came into operation before the passing of the Apportionment Act (4 & 5 Will. 4, c. 22), devised all his real estate to trustees, upon trust for the maintenance of his son until he should attain twenty-one, and afterwards upon trust to permit the son to receive the rents for life. The will directed that any part of the trust funds might be invested in Government securities or in the purchase of land. Various large estates were purchased by the trustees. The son attained twenty-one in July, 1854, and died in the October following: Held, that the representatives of the son were entitled to the whole of the rents which became payable in September, 1854, without apportionment. *Fletcher v. Moore*, 26 Law Journ. Ch. 530.

BASTARD.—*Illegitimacy and legitimacy—Domicil—Inheritance Act—Scotch marriage—Ante-natus.*—The legitimacy or illegitimacy of any individual is to be decided by the law of the country which was the country of his origin; in other words, if a man is legitimate according to the law of his own country, he ought to be regarded as legitimate everywhere. The question might arise, and had arisen, whether the law to be applied to determine the question of legitimacy is the law of the country where the party was born, or of the country where his parents intermarried; or, supposing the parents had two domicils, whether the domicile of the father or the mother should govern the question; but it is a question which does not arise where the country of birth, marriage, and domicile is the same—namely, Scotland. Having regard to the decision in *Munro v. Munro* (7 Cl. and Fin. 842), if the question had arisen, it would seem that it depended on the law of the domicile of the father. A child born in Scotland of Scotch parents, who afterwards intermarry, is clearly legitimate, and not only capable of taking personalty, but real estate, in Scotland, according to the law of Scotland. The rule which this country applied to such a question was, that, even if he was legitimate

according to the law of his own country, if he came to England, our courts would also regard him as legitimate on the mere question of *personal status*; but it does not follow that because a person is the legitimate son of his father, he will, therefore, be entitled, according to the general law of this country (irrespective of the Inheritance Act), to inherit real estate in England of which his father may have died seised; on the contrary, the law of this country and the rules of inheritance (irrespective of the *personal status*) annexed to the real estate itself, will prevent him from being entitled to inherit the real estate of his father though legitimate. That question arose in a case which received more consideration than almost any other case on the subject—namely, *Birt-whistle v. Vardell* (5 B. and Cr. 488, and 9 Bli. N. S. 82), the question being twice propounded to the judges, who both times decided in the same manner, that the party was not entitled. The following case was decided on the above principles, and it will be observed that the late Inheritance Act was held not to affect the question:—A man and a woman cohabit together in Scotland, being domiciled there, and a son is born in Scotland, the fruit of that cohabitation. They afterwards marry, and the son settles in England, acquires real estate there, and dies intestate and unmarried. Although, according to the law of Scotland, the *ante-natus* is legitimatised by the marriage, it is only as to his *personal status*; and under the English law of inheritance, either before or after the 8 & 4 Will. 4, c. 106, he can have no lineal ancestor, nor be lineal issue to any one. *Semble*, the word “issue,” as used in 8 & 4 Will. 4, c. 106, s. 6, means issue capable of inheriting according to law. *Re Don's Estate*, 5 Week. Rep. 836.

BILL OF EXCHANGE.—*Payable to a married woman—Separate estate.*—A bill of exchange being made payable to a person known to be a married woman is notice that it relates to her separate estate. *Dawson v. Prince*, 5 Week. Rep. 813.

CHARITY.—*Lapse—Object failing—Particular and not general objects of charity—Periodical publications.*—In the case of charities, there is a series of cases, including *Thompson v. Thompson* (1 Coll. 895), deciding that a general purpose of instruction was a sufficient charitable gift. Where a bequest is not for promoting the principle of instructing mankind in humanity to animals, but for continuing a particular publication, the case is brought within *Clarke v. Taylor* (1 Drew. 642), and the doctrine of *cy-près* is not applicable, but the gift lapses by extinction of the object. In the following case, it appeared that a testator bequeathed £300 for continuing the “Voice of Humanity” according to the objects and principles set forth in the prospectus attached to the third volume of the “Voice of

Humanity," to be placed at the disposal of a treasurer elected by a public meeting to be held at Exeter Hall. The "Voice of Humanity" was a periodical published by a society called "The Association for promoting Rational Humanity towards the Animal Creation," with which the testator was connected. No further publication of the "Voice of Humanity" took place after the date of the will, the society having ceased to exist about that period: Held, that the bequest had lapsed by the extinction of the objects before the death of the testator, the will contemplating a definite publication carried on by a particular society, and not the general promulgation of charitable purposes in accordance with the principles set forth in the prospectus by any new publication. *Marsh v. Means*, 5 Week. Rep. 815.

CHARITY [*ante*, p. 42].—*Right to "surplus"*—*Corporation—Increase of rents—Intention to give all property.*—The following points arising out of gifts to charity are deserving of attention, especially as being decided by the House of Lords, in opposition to the judges of two inferior courts:—Where a testator gives the whole of his estate to charity, apportioning the rents amongst different charitable objects, if the rents increase, the increase in the gifts shall be in the proportion of the original rents. Where a testator declares his intention to give the whole of some property to charity, but appropriates only a certain part, still the general intention in favour of charity prevails, and the court will make a scheme for the appropriation of the remainder. The question, nevertheless, depends, in each case, upon construction; but where the whole of the annual value of the property was, at the time of the foundation of the charity, distributed amongst charitable objects, that circumstance is taken to be evidence of the testator's intention to give the whole of the increased value to the same objects. *Secus*, if it appears that the testator knew that the value of the property was, or might be, more than the amount which he distributed amongst charities. The use of the word "surplus" is not conclusive that the gift is not meant to be only an aliquot portion of the whole, and to abate rateably with the other specific gifts. But where a testator makes a bequest to parties whom he means to benefit, upon trust to pay certain sums to charities, and then gives to the parties the "surplus," the presumption is that he used the word "surplus" in its *primâ facie* meaning. In this case, the testator gave an estate which he stated in his will to be let for £47 a year to a corporation, in trust to pay £40 a year to certain charitable objects; as to some of which more than a certain amount per annum was not to be paid, and directed that, while certain taxes continued, what the corporation could not spare out of the overplus

of rent—viz. £7—should be deducted out of the sums paid to charities: Held, reversing the decrees of the Master of the Rolls and Lords Justices, that the surplus beyond £40 belonged to the corporation. *The Mayor, &c., of Beverley v. The Attorney-General*, 5 Week. Rep. 840.

DEVISE.—*Construction—Condition repugnant—Gift over in case of intestacy after absolute interest.*—In a will a gift over, if a man shall die intestate, to whom the subject-matter is given absolutely in the first instance, is repugnant and void (*Holmes v. Godson*, 2 Jur. N. S. 383). This rule applies to real as well as to personal estate (*Lightburne v. Gill*, 6 Bro. P. C. 36). In the following case, it appeared that a testator gave all his property, consisting of realty and personalty, to his three children, A., B., and C., share and share alike, the share of A. to be for her during her life, and then to be divided among her children at twenty-one; and if she leave no children, or all her children die under twenty-one, then the said one-third share to be divided between B. and C.; but in case B. and C., or either of them, should die intestate, his or their share or shares was to be divided between their children respectively, share and share alike: Held, first, that the gift over in case B. and C., or either of them, should die intestate, was void as being annexed to a condition repugnant; secondly, that the rule that such a condition is repugnant when annexed to an absolute interest previously given in the same will is the same whether the subject-matter be real or personal estate; thirdly, *semble*, that under the above words, the limitation in case of B. or C. dying intestate was intended only to affect the share originally given to B. and C., and not that given to them substitutionally in default of children of A., who should attain twenty-one. *Barton v. Barton*, 3 Jur. N. S. 808.

DEVISE.—*Estate by implication—Deferred payment—Intermediate income—Annuity deferred till after death of testator's widow.*—Generally speaking, where an estate or a fund is given to one person after the death of another, that person, after whose death the gift is to take effect, takes an estate by implication in all those cases where, by law, and but for the postponement of the gift, the person in whose favour the gift is made, would have taken some interest in the gift itself, as, for instance, if a man gives an estate to his heir-at-law after the death of A.: the same principle applies to gifts of personalty. But the principle upon which this has been established has never been extended beyond cases of that description. *Blackwell v. Bull* (1 Keen, 176), and *Roe d. Bendale v. Somerset* (5 Burr. 2608), seemed to go beyond that, and to lead to a different conclusion; but they involve a great many niceties (see 5

Bacon's Abr. 54, 7th edit.). A testator, by his will, gave several annuities; but, by a codicil, he postponed the payment until after the death of his widow, who, by the will, was entitled to two fourth parts of the testator's residuary estate. In a suit to secure a fund for payment of the annuities: Held, that there was no apparent intention to benefit the widow, and that the income of the fund to arise during her life did not belong to her, but that it formed a part of the testator's residuary estate. *Cranley v. Dixon*, 26 Law Journ. Ch. 529.

DEVISE.—*Charge of estate after date of will—Will speaking from death—Termor acquiring fee—Specific revocation, but reason assigned not arising.*—By sec. 23 of the Wills Act it is provided that "no conveyance or other act made or done subsequently to the execution of a will of, or relating to, any real or personal estate therein comprised, except an act by which such will shall be revoked, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death." And by the following section, the will is, with reference to the real and personal estate comprised in it, to speak as if it had been executed immediately before the testator's decease. V. C. Kindersley has decided that, where a testator has given certain leaseholds for all the residue of the terms for which the same should be held by him at his death, and afterwards acquires the fee, such fee passes under the 24th section of the 1 Vic. c. 26. Where there is a revocation of a specific gift of a house charged with an annuity, and another house is given in substitution, a certain reason being assigned for such revocation, though that reason does not arise, the revocation of the gift and the annuity is complete, and the substituted house is taken free from the annuity. An annuity of like amount, subsequently given, is in substitution for the annuity charged on the revoked gift. *Struthers v. Struthers*, 5 Week. Rep. 809.

EQUITABLE WASTE.—*Ornamental timber—Obligation to rebuild—Mansion pulled down, trees not protected.*—We have noticed the decision of V. C. Wood in the following case, to the effect that a court of equity will protect ornamental trees, although the testator himself has pulled down the mansion-house; we have now to add that the Lords Justices have reversed this decision, holding that as the testator himself had pulled down the mansion-house, the trees in the avenue and park were no longer protected. Lord Justice Turner said: "The broad question arises whether, if the owner in fee of an estate with a mansion-house upon it, and trees planted or left standing for ornament around or about the mansion-house, pulls down the mansion-

house without any intention to rebuild it (for in this case it is clear that there was no such intention), a tenant for life without impeachment of waste under the will of such an owner is or is not entitled to cut down the trees; whether, in fact, the doctrine of the courts of equity reaches to such a case. This doctrine of equitable waste, although far too well settled in the courts of equity to be now in any way disturbed, is, it is to be observed, an encroachment upon a legal right. At law a tenant for life without impeachment of waste has the absolute power and dominion over the timber upon the estate; but the court controls him in the exercise of that power; and it does so upon this ground, that it will not permit an unconscientious use to be made of a legal power. It regards such an unconscientious use of a legal power as an abuse and not as a use of it. When, therefore, the court is called upon to interfere in cases of this description, it is bound in the first place to consider whether there are any special circumstances to affect the conscience of the tenant for life: for, in the absence of such special circumstances, it cannot be unconscientious in him to avail himself of the power which the testator has vested in him. We have then to consider what are the special circumstances which the court will regard as affecting the conscience of the tenant for life, and that which is principally to be regarded is the intention of the settlor or devisor. If by his disposition or by his acts he has indicated an intention that there should be a continuous enjoyment in succession of that which he himself has enjoyed, in the state in which he himself has enjoyed it, it must surely be against conscience that a tenant for life claiming under his disposition, should by the exercise of a legal power defeat that intention. We have here the clue by which the difficulty in this case may be solved. If a devisor or settlor occupies a mansion-house with trees planted or left standing for ornament around or about it, or keeps such a mansion-house in a state for occupation, and devises or settles it so as to go in a course of succession, he may reasonably be presumed to anticipate that those who are to succeed him will occupy the mansion-house; and it cannot be presumed that he meant it to be denuded of that ornament which he himself enjoyed. The court, therefore, in such a case protects the trees against the acts of a tenant for life. But if, on the other hand, the devisor or settlor himself pulls down the mansion-house, upon what ground is it to be presumed that he intended that which is incident to the mansion-house to be preserved? Is it to be presumed that he meant that the incident should be preserved when he has himself destroyed the principal?" The circumstances of the case were as follows: A testator was

tenant for life of two estates, B. and T., with remainder to his eldest son and his issue, with remainder to himself in fee. During his son's life, but with his consent, he pulled down the mansion-house at B., and cut down a few of the trees in the park. By his will he devised the two estates (subject to the settlement) to his second son, the defendant, for life, without impeachment of waste, except voluntary waste, in pulling down buildings without rebuilding them, with remainder to his issue, with remainder to the plaintiff. After the death of the testator his eldest son died without issue, and the defendant came into possession under the will. He threatened to cut down the trees in the avenue and park at B., and pulled down the mansion-house at T., with the declared intention of building a new one; Held, that as between the parties to the suit, the testator must be taken to have pulled down the house and cut the trees at B. in his character of owner in fee. That the testator having pulled down the mansion-house, the court would no longer protect the trees in the avenue and park as ornamental. That, in the absence of any proof of malice in pulling down the house at T., or of delay in rebuilding it, the court would not make the defendant give security to rebuild. *Micklethwait v. Micklethwait*, 5 Week. Rep. 861.

EXECUTOR.—*Defaulting executor*—*Deposit by, of property belonging to testator for debt of executor*—*Debtor and creditor*.—So far as an executor and trustee derives an interest directly under a will, if the executor and trustee becomes a defaulter, that interest is liable to legatees and persons beneficially interested to make good that default; but this does not extend to affect the interest *quâ* executor and trustee. In the following case, it appeared that R. B. L., a surviving executor, entitled as next of kin and personal representative of W. L., a deceased co-executor, deposits a lease belonging to his testator with creditors for a private debt of his own. W. L. is an appointee under a power created by the will of the testator. In an administration suit R. B. L. is found to be a defaulting executor; and a bill being filed to recover the lease, by parties interested under the testator's will: Held, that R. B. L.'s interest as personal representative and next of kin of W. L. is not liable for R. B. L.'s default; that the lease must be brought into court, with an inquiry as to what was due from the estate of the deceased executor, W. L. *Wilson v. Leslie*, 5 Week. Rep. 815.

HUSBAND AND WIFE.—*Post-nuptial settlement*—*Survivorship of wife*—*Performance of covenants*—*Election*.—The following case is one of some importance as to the effect of a covenant (in a post-nuptial settlement) by a married woman to settle all the property she should afterwards acquire. It appeared that the trusts of a post-nuptial settlement

of the wife's present and future property were declared to be for the husband and wife for life, with remainder to the issue of the marriage. Some property came into possession during coverture, which the husband paid over to the trustees upon the trusts of the settlement. After the death of the husband other property belonging to the wife fell into possession, which she refused to settle: Held, that the widow was not bound to perform the covenants of the settlement, but that, electing to take against the settlement, she must recoup, for the benefit of the children, the moneys which she had received under the settlement. *Anderson v. Abbott*, 3 Jur. N. S. 833.

HUSBAND AND WIFE.—*Settlement by minor* [vol. 3, pp. 215, 252]—*Compensation out of personal estate*—*Estoppel of heir*—*Laches*.—In the following case two questions were discussed, arising out of a settlement by a female minor—viz., firstly, whether, where marriage articles purport to convey the real estate of the wife, and that intention fails by reason of the minority of the wife, the husband is entitled to compensation out of the personal estate of the wife for any loss sustained by such failure; secondly, whether, under the circumstances of the case, the husband was entitled to claim the whole personal estate of the wife, as though there had been no settlement, on the ground that the settlement could not be enforced against one party without being enforced against the other. It appeared that a lady married when a minor, and by articles her real and personal estates were settled upon her husband for life, with ulterior limitations. A power of appointment over the personalty was given to the wife in certain events, and the husband covenanted to charge an annuity on his own estates in favour of his wife. There was evidence that the husband had notice at the time of marriage of his wife's minority; but that fact seemed to have been forgotten by all parties, and although the wife survived her marriage many years, she never executed, and was never called upon to execute, any assurance to confirm the settlement of her real estate. She afterwards died, having appointed her personalty under the power: Held, that the wife's real estates were not bound by the settlement, but descended to her heir-at-law; and that, as it must be attributed to the husband's own negligence that the real estates were not effectually settled after his wife came of age, he was entitled to no compensation out of her personal estate. *Campbell v. Ingilby*, 5 Week. Rep. 837.

INJUNCTION.—*Restraint of performance at theatre*.—In *Lumley v. Wagner* (1 De G. Mac. & G. 604), Lord St. Leonards stated, that, even if there had been no stipulation that a singer or performer should not perform at another theatre, the

engagement to perform at one theatre would necessarily exclude the right to perform at the same time at another. In the following case an injunction was granted to restrain an actor from playing during the ordinary hours of performance at any other theatre than that at which he had agreed to perform during the time specified in such agreement. *Webster v. Dillon*, 5 Week. Rep. 867.

MARRIAGE SETTLEMENT.—*Mistake—Reformation* [vol. 3, p. 151].—*Lapse of time—Ultimate limitation of lady's property to herself—Form of settlement.*—In the following case, a marriage settlement was reformed after a lapse of thirty-five years, by giving the lady an absolute interest in the trust-funds (her husband being dead, and without issue), the evidence clearly establishing that such was the intention of all parties to the settlement. The proper mode of giving an absolute interest to the wife after the death of her husband is by limiting the property to the wife, her heirs, executors, administrators, and assigns. *Woltherbeek v. Barrow*, 3 Jur. N. S. 804.

MORTGAGE.—*Conveyance on trust to sell—Trustee Act, 1850—Vesting order.*—The following decision, that a security by way of mortgage, containing also a trust (not a mere power) to sell, is something more than a mere security for money, and is therefore within the Trustee Act, 1850, is one of some practical importance. A. B. conveyed real estate in consideration of £350 to C. D., upon trust, in case of payment of principal and interest within six months, to reconvey; and, in case of default, upon trust, for C. D., his heirs, &c., to sell; and, after retaining principal and interest, to pay the surplus to A. B., his executors, administrators, and assigns, for his own use and benefit. C. D. having died intestate as to this property, and no heir at law having been discovered: Held, that his legal personal representatives were entitled to a vesting order as to the legal estate outstanding to enable them to make a title to a purchaser, the deed not being a mere security for money so as to exclude the operation of the Trustee Act, 1850. *Re Underwood*, 5 Week. Rep. 866.

PUBLIC COMPANY.—*Joint-stock company—Winding-up Acts—Directors—Allotment to directors of free shares—Liability to call on.*—The following decision fixing a director, being an allottee of "paid-up shares," with liability to a call thereon *pari passu*, with holders of ordinary shares, is one of some importance, and proceeded on the grounds of the allotment being a breach of trust in the directors including the allottee-director, and, in effect, deciding that directors of a company cannot allot shares in the company, at least, not to their co-directors, irrespective of the liabilities attaching to them; also that a transfer of all shares in a company by a retiring

director to the continuing directors is invalid, and will not relieve the retiring director from his liabilities as a shareholder, even in respect of shares allotted to him for services performed on behalf of the company, and accepted only as shares on which no call was to be made. The directors of a joint-stock company having passed a resolution "that 2,400 paid-up shares should be divided equally amongst the promoters of the society, in consideration of the services rendered by them in its formation and management," an allotment of 200 "paid-up" shares was accordingly made to D., who was a promoter and a director of the company, and he accepted them. The full amount per share had not been paid up on any of the shares of the company: Held, by Sir G. J. Turner, L. J. (confirming decision of Sir J. Romilly, M. R., *sed dubitante* Sir J. L. Knight Bruce, L. J.), that D. was liable to a call in respect of such 200 "paid-up" shares equally with the other shareholders who had not paid up the full amount of their shares, and that he could not claim exemption from calls on such 200 shares until the full amount per share had been paid up on the other shares of the company. *Daniell's Case, Re the Universal Provident Life Association*, 3 Jur. N. S. 803; 26 Law Journ. Ch. 568.

PUBLIC COMPANY.—*Joint-Stock Bank—Contributory—Transfer not according to rules, and not recognised by company* [ante, p. 86].—The cases presently noticed, with others, establish the general principle, that where the deed of settlement of a company prescribes certain formalities for effecting a transfer of shares, yet, notwithstanding the omission of those formalities, a transfer may be held binding, provided some act is done by the company, or on behalf of the company, by which a transferee is recognised and treated as a shareholder instead of the transferor; as if the transfer has been entered by the proper officer in the books of the company, as took place in Mayhew's case (5 De G. Mac. & G. 837); or if the names of the purchasers were entered in the books of the company as shareholders, as in Walters' case (Id. 629); or if dividends on the shares have been paid to the purchasers, and notices of meetings have been sent to them as shareholders, as in Gordon's case (3 De G. & S. 249); or if the purchasers have been allowed by the company to enjoy the rights and privileges of shareholders, as in Maguire's case (Id. 810); or if the purchasers have been required by the company to pay calls on the transferred shares, as in Watson v. Heal. In the following case it appeared that, by the constitution of a joint-stock banking company, any proprietor wishing to transfer his shares to any person was to give seven days' notice of his intention to the court of directors, and was to comply with certain

other forms; subject thereto, he could, with the consent of the court of directors, transfer his shares by deed, and thereupon become freed of responsibility to the company in respect of his shares. It became the custom at once to prepare the deed of transfer, and then, upon the consent of the court of directors, the transfer was completed: Held, that the consent of the court was not thereby waived, and that, in the absence of such consent, or of any act by the court recognising the transferee, the transferor remained liable to the company. Except by agreement, the costs of contributories representing a class, and contending unsuccessfully, will not be allowed out of the estate. *Re The Royal British Bank, Ex parte Walton*, 3 Jur. N. S. 858; *ante*, p. 86.

SUCCESSION DUTY [*ante*, p. 45].—*Time fixed for act coming into operation—Estates vested prior to the act—Tenant for life and remainderman.*—The following statement may render the decision referred to, *ante*, pp. 45, 46, plainer:—The Succession Duties Act, 16 & 17 Vic. c. 51, received the royal assent in August, 1853, but came into operation on the 19th of May, 1854. The tenant for life of an estate, under a will made in 1826, died in July, 1853, and his eldest son, as tenant in tail, thereupon came into possession of the estate which was vested in him at his birth, under the will of 1826. The court held, that the tenant in tail was liable to succession duty under the act. *Wilcox v. Smith*, 26 Law Journ. Ch. 596.

SURETIES [*ante*, p. 54].—*Interest—Liability, extent of—Costs against principal—Surety not liable.*—Where, in a suit against principal and sureties in a bond, the sureties were held liable to make good a deficit of principal and interest, and costs were given against the principal, but not against the sureties: Held, that the sureties were not to be liable for the costs by circuity under the bond. *The Mayor, &c., of Berwick v. Murray*, 3 Jur. N. S. 847.

TRUSTEE.—*Rate of Interest against a defaulting Trustee Five per cent.* (vol. 1, p. 450; vol. 3, p. 215).—In the following case, the Lord Chancellor explained his judgment in *The Attorney General v. Alford* (4 De G. Mac. & G. 843; 1 Jur. N. S. 360), saying, that if it were supposed that in that case he meant to decide that a defaulting trustee is never to be charged £5 per cent. unless he made that interest by his misconduct, that was not by any means what he meant. If a trustee always has had the moneys in his hands, then his Lordship thought that £4 per cent. is the proper rate to charge him. In *The Attorney General v. Alford*, the money was always forthcoming—that is, the trustee had from time to time made investments of the trust money in Consols; it was, however, always forthcoming; and the Lord Chancellor thought, that, although the

trustee had misconducted himself in not communicating to the proper authorities the fact of the charity, yet that that was not such a description of misconduct as enabled his Lordship to charge him with more than the ordinary rate of interest. His Lordship said, that where a defaulting trustee has misapplied the trust money, there the Court ought to charge him with £5 per cent.: if applying it to his own use, you cannot tell what rate of interest he made with it. *The Mayor, &c., of Berwick v. Murray*, 3 Jur. N. S. 847.

TRUSTEE.—*Voluntary deed—Resulting trust—Property qualification—Statute of Frauds—Legal estate—Bedford Level Act.*—The following case shows that a conveyance to a party to give him a qualification for an office, &c., is not necessarily an absolute gift, but may render the grantee a trustee for the grantor. The plaintiff being entitled in fee simple to the equity of redemption of land in the Bedford Level, and being desirous of giving his son a qualification as bailiff of the Bedford Level, wrote to the registrar instructing him to carry out his intention. The registrar prepared a deed conveying the plaintiff's land to his son in fee, without making any mention of the intention to create a qualification or of the mortgage to which the estate was subject. The plaintiff executed the deed, but remained in possession of the land, and did not inform his son (who was abroad) of the transaction. The son shortly afterwards died. The Bedford Level Act provided that no person should be capable of being a bailiff who had not 400 acres of land in the Level. The plaintiff filed a bill against the heiress at law of his son, praying that she might be declared a trustee for him: Held, that the letter was a sufficient declaration under the Statute of Frauds to constitute the grantee under the deed a trustee for the plaintiff. That the estate of a trustee is a sufficient qualification for a bailiff under the Bedford Level Act. That the fact that the estate was merely an equity of redemption made no difference. *Childers v. Childers*, 5 Week. Rep. 859.

TRUSTEES.—*Trustee Relief Act—Costs* [*ante*, p. 86].—*Married woman entitled absolutely—Settlement, which husband refused to execute—Trustees justified in paying money into court.*—If a trustee, either from caprice or obstinacy, and not acting honestly and truly as a trustee should do, puts the cestuis que trust to expense by refusing to act unless compelled by a decree of the court, or by not doing his duty towards the cestuis que trust, the court will make him pay the costs. The question was raised in *Re Woodburne* (*ante*, p. 86), whether the jurisdiction of equity to order costs was of a general nature, and applied to the payment of money into court under the Trustee Relief Act. As we have seen, it was

decided in that case that the court had jurisdiction to order payment of costs by trustees, if it was from caprice or obstinacy that money was paid by them into court. A married woman being entitled to the absolute interest in £4,000 charged upon real estate, by means of a term vested in trustees, a settlement is proposed by the lady's relatives, and agreed to by the husband, who, however, subsequently refuses to execute the settlement, there being a difficulty in getting trustees, and a question respecting the mode of investment. The surviving trustee of the term pays the money into court under the Trustee Relief Act, and the usual petition is presented by the husband and wife for payment out, and it is asked that the trustee should pay the costs. The lady is examined by commission, and cross-examined on her affidavit, and on both occasions expresses her desire that the fund should be paid to her husband, and the affidavit states that there was no agreement for a settlement. On the question whether there was such a contract to make a settlement as was binding on the husband and wife: Held, that there was not, and that the costs must be paid out of the funds as between solicitor and client, the trustee being justified, under the circumstances, in paying the money into court; also, that the affidavit ought not to have stated that there was no agreement for a settlement. *Re Bendyshe*, 5 Week. Rep. 816; 29 Law Tim. Rep. 341.

WILL.—*Construction—Grammatical meaning—Intention of testator.*—Per Lord St. Leonards: admitting the correctness of the principle of giving to words their natural and grammatical meaning, yet the intention of a testator, gathered from the context, may justify a modification of his words. *Grey v. Pearson*, 3 Jur. N. S. 828.

EQUITY PRACTICE.

ADMINISTRATION.—*Account—Wilful default.*—The rule of courts of equity is, that, in order to obtain an inquiry as to wilful default, the plaintiff must allege a case for such an inquiry, must pray for it, and must prove at least one act of wilful default; and although it may not be necessary, in order to obtain a preliminary inquiry, upon which an inquiry as to wilful default may be afterwards founded, that the plaintiff should conclusively establish such an act, yet there must be such a case made out with respect to some specific item alleged in the bill as raises a doubt in the mind of the court. The dictum of Knight Bruce, L. J., in *Coope v. Carter*, explained *Sleight v. Lawson*, 26 Law Journ. Ch. 553.

ANSWER.—*Discovery—Exceptions—Particulars of separate estate of a married woman.*—Where a married woman's separate property, not the subject of the suit, is sought to be made liable for rents improperly received by her, or a trustee for her, and

discovery is sought as to the particulars of such separate property, it is not sufficient that she answers that she has some separate estate. Exceptions to such an answer allowed. *Wright v. Chard*, 5 Week. Rep. 857.

CONTEMPT [*ante*, p. 87].—*For want of answer—Bringing prisoner to bar of court.*—The following compendious proposition will explain the statements *ante*, pp. 87, 88. The 5th rule of sec. 15 of stat. 1 Will. 4, c. 36, is superseded by the 74th Order of May, 1845, so that the plaintiff must now bring a defendant, who is in contempt for want of an answer, to the bar of the court within thirty days. *Fortesque v. Hallett*, 3 Jur. N. S. 806.

FEME COVERT.—*Separate estate—Separate examination not necessary—Payment of money out of court—Evidence of no settlement—Husband refusing to make affidavit.*—On payment to a married woman, on her separate receipt, of a fund in court belonging to her absolutely to her separate use, it is not necessary that she should be separately examined. It is proper to have an affidavit by the husband as to the absence of a settlement. Where such an affidavit cannot be got, however, payment will be ordered on production of an affidavit by the married woman that there was no settlement, or agreement for a settlement, coupled with another affidavit that the husband has expressly refused to make any affidavit on the subject. *Anon.* 3 Jur. N. S. 899.

PRODUCTION OF DOCUMENTS.—*Accounts for workmen's wages in respect of work done.*—Upon motion for production of documents: Held, that the plaintiffs were not entitled to see the accounts of the prices actually paid by the defendants to their workmen in reference to the work in respect of which the bill in dispute had been sent in, but that the plaintiffs were entitled to see the returns as to labour done and materials used. *The British Empire Steam Shipping Company v. Somes*, 5 Week. Rep. 813; *ante*, p. 20.

SETTLEMENT.—*Covenant to give a sum of money* [vol. 3, p. 152].—*Obligation by specialty—Proof against obligor's estate.*—The following case suggests a caution in framing covenants in settlements for giving at a future time a sum of money to be held upon the trusts of the settlement. A. B. covenanted, in the settlement made in contemplation of his son's marriage, that, upon certain events, he would, by will or otherwise, in his lifetime settle, out of all his real and personal estate (subject to his wife's life estate), £3,000, or property to that amount, so that the same should, immediately after the death of the survivor of himself and his wife, be well and effectually vested in trustees upon trusts for the benefit of his son's intended wife and the issue of the marriage: Held, that the trustees

were entitled to prove as specialty creditors in respect of the £3,000 in the administration of A. B.'s estate: *Eyre v. Monro*, 5 Week. Rep. 870.

COMMON LAW.

ACCIDENTAL INJURY.—*Plaintiff's negligence—Railway crossing road—Fencing road and adjoining lands from railway at the road so crossing.*—The 8 & 9 Vic. c. 20, s. 61 (the Railway Clauses Consolidation Act) enacts, that where a railway crosses a footway on a level, the company shall erect, and at all times maintain good and sufficient gates or stiles on each side of the railway where the railway shall communicate therewith (see *Fawcett v. The York and North Midland Railway Company*, 16 Q. B. 610.) In an action for an injury to the plaintiff or his property, arising from the negligence of the defendant, it is a complete answer to show that the plaintiff has materially contributed to the accident by his own negligence. In the following case it appeared that an occupation road, over which there was also a public footpath, was crossed upon a level by a railway. The company erected gates with locks on each side of the line where it crossed the road, giving keys of the locks to the occupiers of the lands adjoining; the key became lost; no request for another, or any complaint made to the company; the gates being left open by some one, cattle escaped from the field on to the railway, and were killed by one of the trains. In an action by the owner against the company to recover their value, the judge directed the jury, that if they thought the plaintiff had contributed to the accident by his own negligence, they should find for the defendants: Held, that such direction was correct. *Ellis v. The London and South-Western Railway Company*, 29 Law Tim. Rep. 389.

ADMINISTRATION.—*With the will annexed* [vol. 3, pp. 185, 221]—*Right of legatee without citing a non-acting executor.*—One of the two executors named in the will of A. B. alone proved the will. Subsequently, a legatee under a prior will, of which the sole executrix (the wife of A. B.) had died in the lifetime of the testatrix, prayed for administration with the will annexed, without a citation of the non-acting executor of A. B.'s will: Held, that the legatee was not entitled to such grant until the non-acting executor of A. B.'s will had been served with a decree and the usual intimation. *Re Sarah Leach*, 3 Jur. N. S. 822.

CONTRACT.—*Conditional to pay over proceeds received—Lien—Guarantee.*—A contract, by way of guarantee, to pay over to the creditor moneys received as the proceeds of the property of the debtor is conditional, not only upon the receipt of money, the proceeds of such property, but on the receipt

of such money properly payable to him, and does not apply to money received only subject to the prior claim of a third party, and which, therefore, was not payable to the creditor. Where the plaintiff had supplied timber for the erection of a house by the tenant of land on the security of an undertaking, by the defendants, to pay over to him the amount out of the proceeds of the house when sold, and a lease was obtained by the tenant and mortgaged, but the lease was granted, and deposited with the defendants only on condition that it should not be delivered until a claim of the lessor was satisfied (which with the expenses exhausted the mortgage money), and the defendants received the mortgage money on that condition, and applied it accordingly: It was held, first, that the money was to be deemed the "proceeds" of the house; but, secondly, that it was not money received within the meaning of the agreement, and that the plaintiff was not entitled to recover it. *Jupp v. Richardson*, 26 Law Journ. Ex. 261.

DAMAGES.—*Measure of—Delivery of inferior article—Delay of sale—Fall in market.*—In an action brought to recover damages for the delivering of an article inferior in quality to that which was sold, the true measure of damages is the difference between the value of the article of the quality contracted for at the time of the delivery, and the value of the article then actually delivered. This is, however, on the assumption that the article delivered could be immediately resold in the market. But where the defendant by his conduct delays the sale, during which time the market is falling, and the plaintiff resells the article as soon as he reasonably can, and it is properly sold, the proper measure of damages is the difference between the value in the market of the article of the quality contracted for at the time of the delivery, and the amount made by the resale of the article actually delivered. *Loder v. Kekule*, 5 Week. Rep. 884.

DIVORCE.—17 & 18 Vic. c. 47—*Viva voce evidence—Stay of proceedings to prove condonation.*—In a suit for divorce by reason of adultery, promoted by the husband, the proof of the guilt of the wife was conclusive, and she had also in terms admitted it. An application on her behalf to stay the proceedings, to enable her to examine witnesses resident in India and Australia, to prove condonation on the part of the husband, was rejected, and sentence of separation pronounced. *Campbell v. Campbell*, 3 Jur. N. S. 845.

FEME COVERT [ante, p. 84].—*Vendor and Purchaser—Acknowledgment by Married Woman* [vol. 3, pp. 215, 399].—*Infancy of Husband—Fines and Recoveries Act* (3 & 4 Will. 4. c. 74) s. 91.—The following is a plainer statement of the decision men-

tioned in vol. 8, p. 399, tit. "Feme Covert." A husband who, by reason of infancy, is incapable of executing a valid deed, is within the words of the 91st section of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), which enables the Court of Common Pleas, in certain cases provided for by that section, to dispense with the concurrence of the husband in the disposal of any estate which the wife alone, or she and her husband, in her right, may have in lands, &c. *Re Haigh*, 26 Law Journ. C. P. 209; 3 Law Chron. 899.

INSPECTION OF DOCUMENT.—*In possession of opposite party—Dower—Purchaser for value and without notice—Common Law Procedure Act—Bill for a discovery.*—The following case shows what important matters of equitable doctrine are now discussed in courts of law on incidental applications for production, &c.:—The point of "purchaser without notice" was considered in the case presently noticed, with respect to which we may observe that in *Williams v. Lambe* (3 Bro. C. C. 264), on a bill filed by a dowress, Lord Thurlow overruled a plea of a *bonâ fide* purchase without notice of the marriage; and his lordship said that he thought where the party is pursuing the legal title, as dower is, that plea does not apply, it being only a bar to an equitable, not a legal, claim: and the same point was decided by Leach, M. R., in *Collins v. Archer* (1 Russ. and M. 284); and his Honour said that following the case of *Williams v. Lambe*, and the general principle of a court of equity, he was of opinion that the defence was of no avail against the legal title. On the other hand, in *Jerrard v. Saunders* (2 Ves. jun. 454), Lord Loughborough held, that the plea could stand against a legal as well as an equitable title. In *Roper on Husband and Wife*, 451, 2nd ed., the author approves of the doctrine of *Williams v. Lambe*. But a contrary view is taken in a note to this passage by Mr. Jacob, in his edition of that work. And Lord St. Leonards, in his *Treatise on Vendors and Purchasers*, c. 18, also expressed his opinion in favour of Lord Loughborough's, and against Lord Thurlow's ruling; and afterwards, as Chancellor of Ireland, decided the case of *Joyce v. De Moleyns* (1 Jo. & Lat. 263) accordingly. A subsequent case of *The Attorney-General v. Wilkins* (17 Beav. 285) has occurred before Romilly, M. R., and his decision was in accordance with that of Lord St. Leonards. And his Honour stated the principle to be, that when you once establish that a person is a purchaser for value without notice, a court of equity will give no assistance against him, but the right must be enforced at law (see also, *Finch v. Shaw*, 18 Jur. 936; *Dart's Vend.* 542, 3rd edit.). In an action for dower the demandant had obtained a rule nisi for her attorney

to have inspection of, and if necessary to take extracts from, a certain deed in the possession of the tenant, on the ground that her claim to dower arose under the purchase-deed and conveyance (the deed in question) to her late husband, and that the tenant had become the purchaser of the property out of which she was suing for dower, and that she was advised that it was material and necessary that her attorney should have the inspection, &c. It appeared that the tenant became the purchaser of the lands in question for value and without notice that they were subject to dower. The court discharged the rule with costs, on the ground that the weight of authority was greatly in favour of the proposition that no bill for a discovery could have been maintained under such circumstances before the Common Law Procedure Act. *Gomm v. Parrott*, 5 Week. Rep. 882.

LANDLORD AND TENANT.—*Fixtures—In-completed building—Right of owner of land to.*—The following case arose on the question whether, where a landlord gives timber or (what is the same thing) allows his tenant to take timber from his estates to build a house, the tenant has a right to take down that house before it is completed; and whether the fact of the tenant having himself bought and applied some other materials made any difference. It appeared that a tenant, by the permission of his landlord, cut down some trees for the purpose of building a cattle-house upon the land. When the building was completed, with the exception of the roof, the landlord sold his reversion, and the tenant gave the new landlord notice to quit, and took down the unfinished building and removed the materials: Held, that the new landlord was entitled to the building although it was not completed, since the materials of which it was constructed consisted of timber taken from the land by the permission of the owner for the purpose of its erection. *Quære*, whether, where a tenant uses his own materials in the construction of a building, he may, before it is completed, pull it down again, doing no injury to the soil. *Smith v. Render*, 5 Week. Rep. 875.

LANDLORD AND TENANT.—*Use and occupation—When action lies—Devisees in trust—Letting by cestui que trust.*—A "landlord" means not the owner of land, but a person who stands in the relation of landlord to a tenant. Mr. Justice Holroyd observed:—"Before 11 Geo. 2, c. 19, the landlord's remedy by action for his rent must have been upon the demise, and he could only recover according to it. The statute 11 Geo. 2, c. 19, gave to landlords the action for use and occupation in order to avoid the difficulties of suing upon a demise; but it never was intended that the new action should be maintainable where the former was not" (see *Hall v.*

Burgess, 5 B. and C. 332). The statute merely prevents a nonsuit, on the ground that there was a parol demise at a stipulated rent; but it does not give a right to maintain the action in any case in which a right to sue for rent did not exist before the statute. In *Standen v. Christmas* (10 Q. B. 135), Lord Denman fell into two mistakes, he supposing that the statute 11 Geo. 2, c. 19, s. 14, created a new cause of action, and that the meaning of the term "landlord" was different from that above stated. In the following case, upon the principles that the 11 Geo. 2, c. 19, does not create any new cause of action, and that "landlord" is to be understood as above explained, it was held that where a cestui que trust of lands for life let them in her own name, the devisees in trust could not maintain an action for use and occupation against the tenant. *Churchward v. Ford*, 5 Week. Rep. 831.

LANDLORD AND TENANT [*ante*, p. 50].—*Postponing—Distress—Agreement.*—Lord Coke (1 Inst. 204, b.) says: "If a lease be in the affirmative, that if the rent be in arrear for thirty days, the landlord may distrain; yet he may distrain within the thirty days, for the words are in the affirmative, and so cannot take away what is incident of common right," plainly implying that such a provision in negative words would be valid, and, in accordance therewith, the Court of Common Pleas has decided that a distress for rent may be postponed by agreement; and therefore an agreement between a landlord and tenant that no distress shall be made for rent until after the landlord has produced to the tenant the receipt of the superior landlord for previous rent due, renders a distress made by the landlord in violation of such agreement illegal. *Giles v. Spencer*, 3 Jur. N. S. 820.

LIFE INSURANCE.—*Circumstance tending to shorten life, knowledge of, and knowledge of tendency of.*—*Lindenau v. Desborough* (8 B. & Cr. 586), establishes that, as a general rule, it is the duty of a party effecting an insurance on life or property to communicate to the underwriter all material facts within his knowledge touching the subject-matter of the insurance, and that it is a question for the jury whether any particular fact was or was not material to be communicated. It is, however, equally clear that the underwriters may, in any particular case, limit their right in this respect to that of being informed of what is in the knowledge of the assured, not only as to its existence in point of fact, but also as to its materiality. Accordingly, it was held in the following case that a declaration signed by a person about to insure his life (and which declaration, it is agreed, shall be the basis of the contract of insurance) that he is not aware of any disorder or circumstance tending to shorten his life, or to render an insurance

on his life more than usually hazardous, refers not merely to the knowledge of the assured of the disorder or circumstance, but also to his knowledge that it tended to shorten his life, or to render an assurance on his life more than usually hazardous. *Jones v. The Provincial Life Assurance Company*, 5 Week. Rep. 885.

PATENT [*ante*, p. 27].—*Specification—Combination—Infringement—Use of material part.*—It is an infringement of a patent for a combination consisting of several parts for one process to use a material part of the process which is new for the same purpose as that mentioned in the specification, although all the parts of the process as specified are not used. The specification of a patent "for improvements in manufacturing wheat and other grain into meal and flour," described a fixed upper millstone as part of the combination. In an action for infringement: Held, that defendant could not use a part of the combination which was new and material by substituting a rotating upper millstone for a fixed upper millstone. *Bovill v. Keyworth*, 3 Jur. N. S. 817.

PATENT [*ante*, p. 51].—*Specification* [*ante*, p. 52].—*Infringement—Question for the jury.*—In an action for the infringement of a patent, if the evidence has a tendency to show that the defendant has used substantially the same means to obtain the same result as specified by the plaintiff, it is a question for the jury whether there has been an infringement. *De la Rue v. Dickinson*, 3 Jur. N. S. 841.

SUCCESSION DUTY [vol. 3, pp. 48, 224, 388; *ante*, p. 45].—*Exemption—Legacy*—16 & 17 Vic. c. 51, ss. 2, 18.—By sec. 2 of the Succession Duty Act, "every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession;' and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." A testator in 1853 bequeathed £5,000 to trustees, in trust to invest the same in the funds and pay the dividends to his daughter for life, and then as to the principal sum for all her children

equally. The testator died in 1853, and his daughter died in 1854, leaving issue: Held, that the shares taken by the daughter's children were subject to succession duty under the 2nd section of the Succession Duty Act, 16 & 17 Vic. c. 51, and that they were not within the provision of the 18th section; that "no duty shall be payable by any person in respect of a succession, who, if the same were a legacy bequeathed to him by the predecessor, would be exempted from the payment thereof under the Legacy Duty Acts," notwithstanding, at the time of the bequest, there was no act imposing legacy duty where the legatee was the child of the testator, or the descendant of a child—the 18th section not applying to successions which are legacies, and if it did, being confined to persons "exempted" by the express terms of a statute. *The Attorney-General v. Fitzjohn*, 5 Week. Rep. 876.

SURETY.—*Time given, effect of* [vol. 1, p. 453; vol. 3, pp. 88, 212; ante, pp. 46, 54]—*Bills of exchange—Indorsee against drawer—Agreement with third party to give time to acceptor—Indorsee agreeing with stranger to give acceptor of bill time.*—It is quite settled, that an agreement for good consideration with the principal debtor so far ties up the hands of the creditor who has entered into such an agreement as that the surety is thereby discharged; and this remains the law notwithstanding *Ford v. Beech* (11 Qu. Ben. R. 852). The surety has a right at any time to go to the creditor and say, "I suspect the principal debtor is an insolvent; I will pay you, but I wish you to sue him"—as is observed by Williams, J., in *Strong v. Foster* (17 C. B. 219). If by a binding agreement with the principal debtor the creditor has agreed not to sue him for a certain time, it would be a breach of faith, of which the principal debtor would have a right to complain, if any action were brought against him; and this is held to discharge the surety, although it seems, from *Ford v. Beech*, that the creditor might still do so at the risk of an action from the principal debtor on the contract to suspend suing him. It is, however, a very different question, whether this doctrine is to extend for the first time to the case of a contract with a stranger of which the debtor is ignorant, to which he is not privy, and in which the damages to a stranger for a breach of contract may be purely nominal. The doctrine contended for would go the length of establishing that whenever a creditor has placed himself in a position which makes it against his interest to sue the debtor, he has discharged the surety. In the following case, the Court of Queen's Bench held that that doctrine ought not to extend to the case of a contract with a stranger, the principal debtor having given no consideration. There is no ground for saying that a promise has been broken

with him, for there is no privity of contract with him, and there is nothing on which any right either at law or equity, as Lord Abinger observed, in *Lyon v. Holt* (5 Mees. and W. 250), can be founded for him to insist on such a contract. A stranger may have some private reason of his own to wish that some indulgence may be shown. If he can prove good consideration, he may be entitled to damages, large or small, according to any legal interest he may have; but no such doctrine as this arising from a contract with a stranger has ever yet been established. In all the text books the rule is laid down as to a binding contract with an acceptor or principal debtor. The case of *Moss v. Hall* (5 Exch. 56), was a case of a contract with an acceptor. Accordingly the Court of Queen's Bench decided that it is no answer to an action against a surety, that in pursuance of a binding agreement with a third party, time has been given to the principal debtor; and therefore the drawer of a bill of exchange is not discharged by an indorsee agreeing for good consideration with a stranger to give time to the acceptor, and giving time accordingly. *Fraser v. Jordan*, 5 Week. Rep. 819; 29 Law Tim. R. 326.

STAMP.—*Guarantee* [vol. 3, pp. 88, 90]—*Imperfect agreement—Mercantile Law Amendment Act, 1856—19 & 20 Vic. c. 97, s. 8* [vol. 3, pp. 88—92].—In the case of *Ramsbottom v. Mortley* (2 M. & S. 445), a paper was tendered in evidence, and it was objected that it required a stamp. The party was nonsuited on the ground that it was not stamped. Best, Serjeant, applied to set aside the nonsuit on the ground that this was neither a contract nor evidence of a contract, inasmuch as the name of one of the contracting parties, the lessor, was wanting to it. In other words, this was an objection to the contract as an invalid contract under the Statute of Frauds, and therefore, not being a valid contract, did not require a stamp. To that Lord Ellenborough replied: "It may not be evidence of the whole contract, but it is evidence of a material part. If a necessary part in the proof of the contract, I think that it ought to be stamped." Mr. Justice Dampier says: "This may not be such a memorandum of the contract as would satisfy the Statute of Frauds, but it is such a memorandum of the agreement as requires a stamp." The following case was decided on the authority of *Ramsbottom v. Mortley*, the Court of Exchequer holding that, although a guarantee which does not express consideration is admissible in evidence by virtue of s. 8 of the Mercantile Law Amendment Act, 1856 (vol. 3, p. 90), it is not admissible without a stamp. *Glover v. Hackett*, 5 Week. Rep. 881.

WILL.—*Competency of testator—Insanity—Onus probandi—Presumptions.*—In *Starkie on Evidence*,

presumptions are divided into presumptions of law, which are altogether artificial; presumptions of law and fact, which are of a mixed character, being also artificial presumptions, but to be found by juries, being recognised and warranted by the law as the proper inferences to be made by juries under particular circumstances; and natural presumptions, or presumptions of mere fact. The Court of Common Pleas have, in the following case, held that the presumption of sanity is not a merely artificial or legal presumption, but at the utmost a presumption of law and fact; that is, an inference to be made by a jury from the absence of evidence to show that a party does not enjoy that soundness which experience proves to be the general condition of the human mind. But in such cases, when evidence is laid before a jury, they must decide according to what they believe to be the truth; and when a will is set up as a valid will, a jury ought not to pronounce it to be so, unless they are convinced of the affirmative. Therefore, in an ejectment, where the defendant admitted that the claimant was heir-at-law of the person last seised, and claimed as devisee, and produced a will, and after proving the execution of it called witnesses to prove the competency of the testator, and the claimant then gave evidence to impeach his competency, and the judge in summing up told the jury that the law presumed sanity, and therefore the burden of proof was shifted; and that the devisee must prevail unless the heir-at-law established the incompetency of the testator, and that, if the evidence was such as to make it a measuring cast, and leave them in doubt, they ought to find for the defendant: Held, that the judge had misdirected the jury. *Sutton v. Sadler*, 5 Week. Rep. 880.

WILL.—*Duplicate copies*—*Presumptions of revocation*.—The law presumes that if a testator executes a will in duplicate, retaining one copy in his own possession, and delivering over the other to another person's custody, and subsequently destroys, *animo revocandi*, the copy in his own possession, that such destruction is a revocation of the copy not in his own possession. A second presumption is, when a will is executed in duplicate, and one copy is proved to have been in the testator's possession, and it cannot be found on his death, that the testator himself destroyed it *animo revocandi* (*Rickards v. Mumford* 2 Phill. 24; *Colvin v. Fraser*, 2 Hagg. Eccles. 266). P. duly executed his will in duplicate in Aug. 1813; one copy he deposited with one of the executors therein named; as to the other, there was no evidence whether he retained it in his own custody or not. He became insane in 1827, and so remained till his death. Only the copy in the custody of the executor was then forthcoming: Held, that the

ordinary legal presumptions as to revocation of one duplicate by reason of the destruction or non-appearance of the other, did not under the circumstances arise; and probate of the copy in the hands of the executor was granted. *Topham v. Norris*, 29 Law Tim. Rep. 846.

COMMON LAW PRACTICE.

ARREST.—*Sheriff*—*Bailiff not named in warrant*—*Rule to discharge out of custody*—*Acting in execution of writ*—*Not to bring action*.—An arrest under a *ca. sa.* by a bailiff, to whom the warrant is not addressed, in the absence of the officer to whom it is addressed, even though such officer has engaged him to assist him in his absence, he himself being at a considerable distance at the time of the arrest, is irregular, and the defendant will be discharged out of custody. A rule to discharge him is properly directed to the plaintiff, and not to the sheriff. If the rule does not ask for costs, the court will not impose it as a condition that the defendant shall bring no action. *Rhodes v. Hull*, 26 Law Journ. Ex. 265.

COSTS.—*Distributive issues* [*ante*, p. 94].—*Allowance of costs to defendant where there is a distributive issue, and he has succeeded in reducing plaintiff's claim*—*Recovering over-payments on admittance to copyholds*.—The 75th section of the Common Law Procedure Act, 1852, enacts, "that pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively." That section forms part of a series which, by its special preface, is confined to pleas and subsequent proceedings; and the words of that section are followed by these: "If issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the jury." These considerations show clearly that the section was intended to relate to those cases where pleas or subsequent pleadings are denied, and part of them sufficient to cover in part the declaration or preceding pleading is proved, and not to apply to cases in which the declaration itself is denied. Great difficulty had arisen as to pleas of set-off and other similar pleas, where, on the evidence, so much was proved as would answer a part only of the declaration; and the object of the statute was to meet such cases as *Tuck v. Tuck* (5 M. and W. 109), where the defendant proving his set-off, but not covering the whole claim in the declaration, the plaintiff was held entitled to a verdict on the only plea (see the observations of Jervis, C. J., in *Gabriel v. Dresser*, 24 Law Journ. C. P. 81; 3 Week. Rep. 286). Probably the Legislature did not think that the case of the divisibility of issues denying the declaration required provision, there having been a course of practice, and several de-

cisions, on the subject of finding issues distributively, some of which decisions, as observed by Mr. Gray in his law of costs (p. 168), seem to have anticipated, in many cases, the effect of s. 75, even as to the distribution of issue on special pleas. When the rules of Hilary Term, 1832, gave parties the costs of issues according as they were found, it became more generally important to have the findings on issues entered distributively where capable of distribution in fact; and a practice has arisen, sanctioned by several decisions, of defendants claiming to have a verdict, judgment, and costs, for the part of the declaration on which the plaintiff fails, if the declaration be capable, in its nature, of distribution. In many cases, from the nature of the declaration, there is no difficulty in this. Thus issues, taken on pleas in denial of the whole count, have been held distributable in actions of trespass, and in trover for distinct specified chattels, in trespass to the realty, in ejectment in case of libel where the libellous matter is capable of separation; and in debt for work and labour (see the cases collected in page 42 of Gray on Costs). In most of these cases, from the nature of the action, there seems no difficulty in saying (for example), that the defendant had converted the corn, but not the horse mentioned in the declaration; but in the case of *indebitatus assumpsit*, the sum in the declaration being, for some purposes, immaterial, and the issue of never indebted having been sometimes regarded as raising the question, does the defendant owe anything? and if so, how much? the sum in the declaration being treated as meaning any sum the plaintiff may prove. It might be thought that where the jury found the defendant indebted in a certain sum, there was no residue to find for the defendant. Until 1832, it was never thought that a defendant could say, where a verdict was found against him for less than the whole sum claimed, that he was entitled to a verdict for the residue; and the observations of Lord Abinger, in *Bird v. Penrice* (6 M. and W. 755), are strongly in favour of this view. However, in the previous case of *Cousins v. Paddon*, (2 Cr. M. and R. 547), an issue on the plea of the general issue seems to have been entered distributively, and a verdict for the residue found for the defendant; and the same course was adopted in the more recent case of *Welby v. Brown* (1 Ex. 770), where to an action for work and labour, and on an account stated by an attorney, the defendant pleaded three pleas each to the whole declaration—never indebted, Statute of Limitations, no signed bill; and the verdict was ultimately entered, as to the first issue as to £18 10s. 3d., for the plaintiff—as to the residue of the sum demanded, for the defendant; on the second, for the plaintiff; on the third, for the defendant. The general costs of the cause were for

the defendant, but the plaintiff was allowed by the court the costs of all witnesses who attended solely to prove what he recovered on the first issue, or to prove his case on the second issue; the defendant having the costs of the witnesses who attended only to reduce the plaintiff's demand on the first issue, and of those who attended to prove the third issue. The Court of Queen's Bench have followed this decision, and, in the following case, held that an issue may be treated distributively where the justice of the case requires it; and it appears that the defendant has made a successful resistance as to a distinct part of the claim. An action was brought to recover the excess of fees unduly exacted by the lord and steward of a manor, on admission to copyhold tenements. The declaration consisted of the *indebitatus*, money counts, and the only plea was never indebted. The particulars of demand consisted of nine items (total, £17 1s.). A special case was after a verdict for the plaintiff by consent stated, for the opinion of the court. The decision was partly in favour of the plaintiff, and partly in favour of the defendant; and the plaintiff ultimately recovered something in respect of every one of the eleven items, and entered up judgment for the amount. On the taxation of costs, the master considered the question decided by the court, and allowed costs to the plaintiffs and defendants respectively according to the finding of the court, treating each party as partially successful: Held, that the taxation of the master was upon the right principle, and that the issue on never indebted might, in this case, be so distributed as to entitle the defendants to have the costs incurred by them allowed as to the parts on which they had succeeded. *Treherne v. Gardner*, 29 Law Tim. Rep. 327; 5 Week. Rep. 816.

COSTS.—*Bankruptcy proceedings—Consolidation Act, 1849* (12 & 13 Vic. c. 106, s. 86)—*Trader's affidavit of debt—Recovery of less sum—Reasonable and probable cause* [vol. 8, pp. 306, 324].—We have, in vol. 3, p. 324, set out the 86th sec. of the above statute, by which, where a plaintiff files an affidavit of debt to make the defendant a bankrupt, but fails to recover the full amount, the defendant is entitled to apply to the court for his costs. In ascertaining whether a plaintiff, who does not recover the full amount of the sum for which he has filed an affidavit of debt in the Court of Bankruptcy, had, within the meaning of section 86 of the Bankruptcy Law Consolidation Act, 1849, reasonable and probable cause for making such affidavit, the court will consider, not merely the belief of the plaintiff that such amount was due to him, but whether the facts and the law of the case justified his belief. *Hope v. Fenner*, 26 Law Journ. C. P. 207.

BANKRUPTCY.

ARRANGEMENTS BY DEED [*ante*, p. 95; vol. 3, pp. 54, 160].—*Requisites of deed*—12 & 13 Vic. c. 106, ss. 224—228.—A plea founded upon an arrangement by deed under the Bankrupt Law Consolidation Act, 1849, ss. 224, &c., is bad, unless it shows that the deed provided not only for the distribution of *all* the debtor's estate and effects, but also for its distribution among *all* the creditors, and not only those who should execute the deed. *Bloomer v. Darke*, 26 Law Journ. C. P. 214.

CERTIFICATE [vol. 3, p. 36, 227, 380].—*Misrepresentation*—"Gaming or wagering" [vol. 3, p. 227].—*Bankrupt Act of 1849*, s. 201.—By sec. 201 of the Bankruptcy Consolidation Act, no bankrupt is to be entitled to a certificate of conformity, or having obtained one, the same is to be void, if (*inter alia*) "such bankrupt shall have lost by any sort of gaming or wagering in one day £20, or within one year next preceding the filing of the petition for adjudication, £200." In the following case, the bankrupt had had transactions in Consols and in Turkish Guaranteed Four per Cent. Scrip, which he had from time to time bought for the account, but with no intention that the stock should be transferred to him. Upon the account-day arriving, he had paid the difference occasioned by a fall in the value of the stock, in order to carry on the transaction to the next account, and in this way he had, on several occasions, lost more than £20 in one day: Held (reversing the decision of Mr. Commissioner Holroyd), that, although transactions of this nature might be "gaming or wagering" within the meaning of other statutes where those words were used, they were not so within the meaning of the above 201st section of the Bankrupt Law Consolidation Act, and therefore they would not disentitle the bankrupt to a certificate. They were, however, to be taken into consideration with other conduct on his part when deciding on the question of certificate; and, under all the circumstances, their lordships suspended the certificate until two years should have expired from the date of the adjudication; directed that, when granted it should be of the second class; and withheld all protection to the 1st September next. *Exp. Ryder, re Ryder*, 29 Law Tim. Rep. 336.

EXECUTION.—*Discharge from after a year*—*Sec. 259—Construction of—Execution under certificate B. a* [vol. 3, pp. 227, 308].—By sec. 259 of the Bankruptcy Consolidation Act, if any bankrupt shall be taken in execution after the refusal of protection, or after the refusal or suspension of his certificate, he shall not be discharged from such execution until he shall have been in prison for the *full period of one year*, except by order of the court. The words "full period of one year" limited by the

above section, 259, as the term of imprisonment of a bankrupt under an execution issued to a creditor who has obtained the certificate B. a, under section 257 must be taken to refer to an imprisonment in the same suit, and do not apply to a case in which the term is made up of two several periods of imprisonment under two several executions by different creditors under the certificate B. a, one being before passing the last examination, and the other upon the refusal of the certificate. *Semble*, after a bankrupt has been in prison for the full period of one year, upon an execution sued out by a creditor under the certificate B. a, the power of the court to discharge him under section 259 is gone, and the bankrupt is entitled to his discharge forthwith. *Exp. Crole, re Crole*, 29 Law Tim. Rep. 345.

LANDLORD AND TENANT.—*Machinery in cotton mills under lease—Bankruptcy of lessee—"Order and disposition"* [vol. 3, pp. 187, 333, 392].—*Reputed ownership—Sec. 125 of the Bankrupt Law Consolidation Act, 1849* [set out vol. 2, p. 337].—*Lien by way of covenant* [vol. 1, p. 68].—The following case on the bankruptcy doctrine of reputed ownership in relation to machinery, &c., demised to a bankrupt tenant, is one of great importance, establishing that where there is a demise of a mill with the machinery, &c., with a covenant by the lessee to keep up the machinery, &c., to a certain amount, on the lessee's bankruptcy, though the amount of machinery is less in value than required to be kept by the covenant, the machinery passes to the lessee's assignees as being in his reputed ownership: the true owner of the machinery being the landlord, the tenant was in possession with his consent, and the lien by way of covenant did not prevent the reputed ownership no more than a mortgage would have done (vol. 1, p. 63). It appeared that by an indenture of lease, the plaintiffs demised to R. W. and J. W. the cotton mill and premises therein described, and the steam engine and fixtures therein mentioned for a term of sixteen years. The lease contained a covenant by R. W. and J. W. to keep upon the premises, as security for the rents accruing, machinery for cotton spinning of the full value of £3,000 at the least. They also covenanted not to underlet or assign without the licence of the plaintiffs. The lease also contained a proviso that if the rent reserved should be in arrear, or in case of breach or non-performance of any of the covenants therein contained, or if R. W. or J. W. should become bankrupt or insolvent, or should make any assignment of their estate and effects for the benefit of their creditors, it should be lawful for the plaintiffs to re-enter upon the premises. R. W. died, leaving J. W. surviving, and he was recently adjudged a bankrupt, and the defendant was duly appointed the official assignee of

his estate. The machinery upon the premises was not worth £3,000, and no rent was due from the bankrupt. The defendant took possession of the mill, works, and machinery, and was proceeding to remove the cotton-spinning machinery, as part of the bankrupt's effects, to prevent its being liable to a distress for rent (then on the point of coming due) by the plaintiffs, but they insisted that the defendant had no right so to do. The plaintiffs were about to file a bill in the Court of Chancery for an injunction to restrain the defendant from removing the machinery, when it was arranged that a special case should be agreed upon for the opinion of their lordships: Held, that the machinery was within the order and disposition of the bankrupt, and in his reputed ownership with the plaintiff's consent, and that the official assignee was entitled to remove it. The case being entirely new, costs were ordered to be paid out of the estate. *L. J. Turner* observed that the decision did not extend to cases where, according to the custom of the country or district, there was a habit of keeping the machinery under the control of the landlord in a similar manner. *Shuttleworth v. Herniman*, 29 *Law Tim. Rep.* 338; 5 *Week. Rep.* 853.

PROSECUTION OF BANKRUPT [vol. 3, p. 333].—*Reason for which the court will interfere with discretion of assignees.*—By sec. 255 of the Bankruptcy Consolidation Act, if any bankrupt be suspected of or charged with the commission of any of the offences specified in the statute, the commissioner may direct the assignees to institute and carry on a prosecution of the bankrupt for such offence. Where the assignees have obtained an order under the above section 255, for the prosecution of the bankrupt at the costs of the estate, and there does not appear anything to show that they have acted improperly in the exercise of their discretion, the court will not, upon the application to review or rescind the order by three or four creditors, who have proved to an amount representing only about one-sixth of the whole debts, and wholly unsupported by evidence, interfere with such discretion of the assignees. *Exp. White, re W. and H. Wilson*, 29 *Law Tim. Rep.* 345.

COUNTY COURTS.

COMMITMENT—Insolvency—Discharge—Judgment summons—Power to commit—9 & 10 *Vic. c.* 95, ss. 99, 102—19 & 20 *Vic. c.* 108, s. 2.—In the following case the question was, whether the judge of a county court has jurisdiction to commit a defendant to prison by warrant upon a judgment summons issued under 9 & 10 *Vic. c.* 95, s. 99, after the defendant has obtained a valid order of discharge under the Insolvent Debtors' Act, comprising the

judgment debt in respect of which the judgment summons was issued. This question was first brought to a decision in *Abley v. Dale* (11 *C. B.* 778; 2 *Lond. M. & P.* 498; 15 *Jur.* 1012), and answered in the affirmative, upon the express words of the statute, notwithstanding the manifest injustice of making a debtor liable to imprisonment for not paying a debt after the law has taken away from him all his property, and also of making him liable to be imprisoned in punishment for misconduct by the insolvent commissioner, and liable to be again punished for the same misconduct by the county court judge, or to be acquitted by the one and found guilty by the other, upon the same evidence, in respect of the same charge. In *Abley v. Dale*, this injustice is recited in the judgment; but the court acted on what they considered the clear words of the statute. The decision in that case has been followed in *Ex parte Christie* (4 *El. & Bl.* 714; 1 *Jur. N. S.* 211), and in *George v. Somers* (16 *C. B.* 539; 11 *Exch.* 202); but they both rest on *Abley v. Dale*. The decision in *Abley v. Dale* proceeded on the words in sect. 102 of the act, providing that no order granted by the Court for the Relief of Insolvent Debtors should be available to discharge any defendant from any commitment upon any order there mentioned—viz., sect. 99. The law, as thus declared, being so manifestly unjust, the 19 & 20 *Vic. c.* 108 was passed to repeal (sect. 2) the very proviso in sect. 102 of the County Court Act. Sect. 2 of that statute expressly repeals the enactments mentioned in schedule A., and, amongst others, so much of sect. 102 of stat. 9 & 10 *Vic. c.* 95, as enacts "that no protection order or certificate granted by any court of bankruptcy, or for the relief of insolvent debtors, shall be available to discharge any defendant from any commitment under the order of a judge." The Court of Queen's Bench has decided that the judge of a county court has no jurisdiction to commit a defendant to prison by warrant upon a judgment summons issued under the 9 & 10 *Vic. c.* 95, s. 99, after the defendant has obtained a valid order of discharge under the Insolvent Debtors' Act, comprising the judgment debt in respect of which the judgment summons was issued; the proviso in sect. 102 of stat. 9 & 10 *Vic. c.* 95, on which the decision in *Abley v. Dale* (11 *C. B.* 778; 15 *Jur.* 1012) rested, being repealed by stat. 19 & 20 *Vic. c.* 108, s. 2. *Cookman v. Rose*, 3 *Jur. N. S.* 866.

CRIMINAL LAW.

BEER ACT.—4 & 5 *Will. 4, c.* 85, s. 8—*Licence—False certificate—Conviction—Form in section 35 of* 11 & 12 *Vic. c.* 43.—The exception, in section 35 of 11 & 12 *Vic. c.* 43, of "any information or complaint,

or other proceeding under or by virtue of any of the statutes relating to her Majesty's revenue of excise or customs, stamps, taxes, or post-office," does not apply where the particular information or complaint proceeds upon a section of a statute not relating to the revenue of excise, &c., although there are other sections in the statute which do relate to the revenue of excise, &c. A conviction, therefore, under section 8 of 4 & 5 Will. 4, c. 85, for signing a false certificate for the purpose of obtaining a licence for the sale of beer, drawn up according to the form provided in schedule (I. 1.) of 11 & 12 Vic. c. 43, is valid. *The Queen v. Bakewell*, 26 Law Journ., M. C. 150.

BURIAL BOARDS [*ante*, p. 31].—*Charity property*—15 & 16 Vic. c. 85, s. 29—"Approval of vestry"—*Costs*.—The 15 & 16 Vic. c. 85, s. 29, provides, that any burial board under that act, "with the approval of the vestry," and of the guardians of the poor of the parish (if any), and of the Poor-law Board, may from time to time appropriate for the purposes of a burial-ground for such parish, either alone or jointly with any other parish or parishes, any land vested in such guardians, or in the churchwardens, or in the churchwardens and overseers of the parish, or in any feoffees, trustees, or others, for the general benefit of the parish, or for any specific charity; provided always, that where any land so taken and appropriated shall be subject to any charitable use, such lands shall be taken upon such conditions only as the Court of Chancery, in the exercise of its jurisdiction over charitable trusts, shall appoint and direct." A burial board presented a petition praying to be empowered to purchase charity lands for a new cemetery. It appeared that the approval of the vestry required by the above act, sec. 29, had been originally given to the scheme, and afterwards confirmed under a misapprehension of the true facts of the case. At a subsequent meeting of the vestry, when the true facts had been ascertained, an amendment of the original approval of the vestry was proposed, but lost. A poll of all the ratepayers was then taken, by whom the amendment was carried. The burial board had obtained the approval of the guardians of the poor of the Poor-law Board, the charity commissioners, and the Secretary of State: Held, that there had been no due "approval of the vestry" within the terms of the 29th section of the 15 & 16 Vic. c. 85; and that the petition of the burial board must be dismissed, though without costs. *Re The Egham Burial Board*, 29 Law Tim. Rep. 843.

COSTS BY CROWN [vol. 2, pp. 58, 121, 227].—*Information by excise officer*—2 & 3 Will. 4, c. 120, s. 27—*Appeal—Costs of respondent*—12 & 13 Vic. c. 45, s. 5—18 & 19 Vic. c. 90, ss. 1, 2.—By

sect. 5 of the 12 & 13 Vic. c. 45, "upon any appeal to any court of quarter sessions, the court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such court appear just and reasonable." The 18 & 19 Vic. c. 90, entitled "An Act for the Payment of Costs in Proceedings instituted on behalf of the Crown in matters relating to the Revenue" (see vol. 2, pp. 121, 122), has the words, in sect. 1, "all informations in respect of any sum or sums of money due and owing to her Majesty by virtue of any vote of Parliament for the service of the Crown, or of any Act of Parliament relating to the public revenue (see the act set out vol. 2, p. 122). Upon appeal against an acquittal upon an information by an excise officer, under stat. 2 & 3 Will. 4, c. 120, s. 27, the quarter sessions confirmed the acquittal with costs: Held, that the quarter sessions had no jurisdiction to order costs to be paid to the respondent by the excise officer, either under stat. 12 & 13 Vic. c. 45, s. 5, because the Crown was not named in it; or under stat. 18 & 19 Vic. c. 90, s. 2, because it was confined to informations to which the Attorney-General was party. *Reg. v. Beadle*, 3 Jur. N. S. 862.

POOR-RATE.—*Exemption from—Rateability of the university as the occupier of public buildings—Rateability of college chapels and libraries* [vol. 1, p. 347].—The University of Oxford must be judicially regarded as a national institution, erected for the advancement of religion and learning through the nation; and is not liable to be rated to the relief of the poor, in respect of land or buildings occupied by it solely for those public purposes. Such are the Bodleian Library; the Divinity and other schools; the Convocation House and Apodyterium; the Old Convocation House and Law School; the Sheldonian Theatre, the use of it as a concert-room being merely occasional and exceptional; the Ashmolean Museum, except the lower part, occupied as a residence by the reader in mineralogy; the Clarendon Buildings; the Botanic Garden; the Taylor Institution; and the University Galleries. But the university is rateable in respect of a cellar under the Sheldonian Theatre, permitted to be occupied by a private individual for his own benefit, though without payment of rent. So the residences of the professor, the porter, and the head gardener at the Botanic Garden, and the land appropriated to the use of the latter; and the residence of the librarian at the Taylor Institution, so far as the same is referable to private convenience, and not to public duty, are rateable. And the colleges, being institutions of a more private character, are also liable to be rated in respect of their chapels and libraries.

Reg. v. The Vice-Chancellor of the University of Oxford, 29 Law Tim. Rep. 343; 5 Week. Rep. 872.

PUBLIC HEALTH ACT, 1848 [vol. 3, pp. 23, 330].—*Rate—Publication under sec. 103—Effect of non-publication.*—Section 103 of the Public Health Act, 1848, requires rates made under that act to be published in the same manner as poor rates, but does not go on to say that "otherwise the rates shall be of no force or validity," nor contain other nullifying words. A rate made under the Public Health Act was objected to, on the ground of non-publication only; but, nevertheless, justices issued their warrant of distress to enforce the payment thereof: Held, that the rate was not invalid therefore, and that the justices had jurisdiction to issue the warrant, and that parties acting in the execution of it were protected thereby. *Le Feuvre v. Miller*, 29 Law Tim. Rep. 344.

VENDORS AND PURCHASERS.

POWER OF SALE [vol. 3, p. 311].—*Surviving trustee—Devisee—Power to appoint new trustees.*—The case of *Cooke v. Crawford* (13 Sim. 91) decided solely that where a trust is to be executed by trustees and their heirs, the testator has not intended the trust to be severed from the estate, and therefore that the assignee or devisee could not be allowed to do what the trustee or the heir was directed to do; and at all events that no one could be compelled to take a title under an assign when the trust was only to be performed by the heir. In *Ockleston v. Heap* (1 De G. & Sm. 640), the devise was to two trustees, their heirs, executors, administrators, and assigns; one of the trustees declined to act, and formally renounced; and the remaining trustee who acted, devised the trust estates upon the same trusts on which he held the property. *V. C. Knight Bruce* acceded to the view of the cestuis que trust, and made a decree for the appointment of new trustees, observing, "What I should have done if *Titley v. Wolstenholme* had come before me, I need not say, nor am I sure." In *Mortimer v. Ireland* (11 Jur. 721), Lord Cottenham said, "The argument amounts to this: that the executor of a trustee is of right a trustee; but this is not so, for whether the property is real or personal estate is no matter, for suppose a man appoints a trustee of real and personal estate *simpliciter*, adding nothing more, this cannot make his representative a trustee. *Titley v. Wolstenholme* was very different; for there the court proceeded on the intention manifested that the trust should be performed by the assigns of the survivor." Lord Cottenham, therefore, recognised that case; where, therefore, a testator devises

trust premises to trustees and their survivor, their and his heirs and assigns, it cannot be held that the assigns should not execute the trust. Accordingly in the following case, where there was a devise to trustees, their heirs and assigns, upon trust that they and the survivors or survivor of them, his heirs and assigns, should sell the trust premises, and the will also contained a power of appointing new trustees, it was held, that the devisees of the surviving trustee could make a good title to a purchaser under the power of a sale. *Hall v. May*, 5 Week. Rep. 869.

PUBLIC COMPANY [vol. 3, p. 130].—*Specific performance—Railway company* [ante, p. 40].—*Companies' Clauses Act, 1845—Agreement under seal or hands of two directors—Mandamus proper proceeding.*—In *Adams v. London and Blackwall Railway Company* (6 Rail. Cas. 271), which was a case depending exclusively upon a notice to take land given by a company under the provisions of the Lands Clauses Act (ante, p. 40, as to the effect of such a notice), Lord Cottenham expressed great doubt as to whether a court of equity would compel the company specifically to perform the contract, and whether it was not the more proper province of the Court of Queen's Bench to direct the company by mandamus to proceed to purchase the land at the stipulated price. In the following case it was held that to enable the court to decree specific performance of an agreement by a railway company to purchase, the agreement must be signed by two directors, or under the corporate seal of the company, so as to comply with the formalities required by the Companies' Clauses Act, 1845, s. 97. It appeared that negotiations were entered into for the purchase of a canal by a railway company. In pursuance of these negotiations an act was obtained, enacting that it should be lawful for the canal company to sell to the railway company, and the railway company "were thereby authorised and required, with the consent of three-fifths of the shareholders, to purchase the canal." At a meeting specially held, a resolution was passed by upwards of three-fifths of the shareholders, authorising the directors to complete the purchase at such time, and under such terms and conditions, as to them should seem meet. No steps were taken by the directors to complete the purchase: Held, that there being no contract signed by two directors or under the corporate seal, specific performance of the agreement could not be decreed. *Semble*, that in such a case, in accordance with the views of Lord Cottenham above stated, the canal proprietors should have applied for a mandamus to compel the railway company to complete the purchase upon the terms specified. *The Leominster Canal Navigation Company v. The Shrewsbury and Hereford Railway Company*, 5 Week. Rep. 868.

JUDGMENT CREDITORS.—*Lien on purchaser's interest under a contract for sale*—1 & 2 Vic. c. 110, s. 13.—The following decision shows how embarrassing the law of registered judgments is, as respects purchasers and vendors, by giving a lien on a purchaser's interest under a contract for sale, though abandoned by him. It appeared that the plaintiffs contracted to sell land to the defendants, who paid part of the purchase-money and then became insolvent, and were unable to complete the contract. The land was afterwards sold under a decree of the court, and the purchaser having ascertained that the defendants were indebted to certain creditors on judgments, required the judgment creditors to release their rights, or to join in the conveyance: Held, that the judgment creditors had such a lien on the equitable estate of the defendants, that the purchaser was entitled to have their concurrence. *The Governors of the Grey Coat Hospital v. The Westminster Improvement Commissioners*, 5 Week. Rep. 855.

COMPENSATION FOR DEFECT IN TITLE [vol. 8, p. 277].—*Indemnity—Specific performance, with compensation—Wife refusing to bar her dower—Costs—Mutuality.*—Great difficulty has always been felt as to granting specific performance of contracts for sale with compensation for any defect in the title or other matter. In *Nelthorpe v. Holgate* (1 Coll. 203), which was the case of a person purporting to sell an absolute interest, but who was in fact entitled subject to his mother's life interest, specific performance was decreed with an abatement by way of compensation. Sir J. L. Knight Bruce, then Vice Chancellor, said he made that decision without acceding to the broad and general argument urged on the plaintiff's part, as to the performance of contracts with compensation wherever the vendor can give part, but not the whole of what he has contracted to sell. It might be different as observed by V. C. Wood in the following case, and the case of a defendant resisting specific performance with an abatement would be much stronger, if he could show any peculiar difficulty in estimating the amount of compensation. One obvious observation upon this question of compensation is that which pressed Lord Redesdale in *Lawrenson v. Butler* (1 Sch. and Lefr. 13), and *Harnett v. Yielding* (2 Id. 553)—viz., the disadvantage under which the vendor would be for want of mutuality if it were to be held that the purchaser could enforce the contract with a compensation; whereas the vendor never could force the completion upon a purchaser, even by submitting to a deduction for compensation; so that there is no mutuality. At the same time, however, it is to be observed that the court has gone a long way in favour of a vendor on the point of

mutuality, as the case of *Mortlock v. Buller* (10 Ves. 292) shows. In the following case, it appeared that A. contracted to sell to B. the fee-simple, clear of incumbrances. B., aware that on a former occasion an attempted sale had gone off in consequence of A.'s wife refusing to bar her dower, asked as to this, and was informed that she would now join; afterwards she refused to join: Held, that B. was entitled to compel a specific performance, with a compensation and indemnity against the right to dower. *Semble*, a proper indemnity would be to retain in court a third part of the purchase-money, the dividends to be paid to A. and his assigns during the joint lives of himself and wife: and if she survived A., to B. during her life; and upon her decease, the capital so retained in court to be paid to the husband, A. At the hearing, the decree, as drawn up by the plaintiff, was simply for specific performance, although the court had directed it to be without prejudice to the question of compensation: Held, that the plaintiff was not thereby precluded, as having elected to take the decree in that form, from asking for compensation. Where a vendor has not furnished a complete abstract until after a general reference as to title, he will have to pay the costs of the reference, although no defect of title is discovered upon the inquiry, except such as was already known to the purchaser. The want of mutuality is not a sufficient argument against granting specific performance, with compensation at the prayer of a purchaser, although a vendor could not compel a purchaser to accept such a compensation. *Wilson v. Williams*, 3 Jur. N. S. 810.

SPECIFIC PERFORMANCE.—*Building lease—Attorney and client—Surprise—Surveyor consulted—Solicitor for both parties—Covenants in lease not to sublet; re-entry for breach.*—After a negotiation of some years, J. agreed in writing to take a building lease of land on the terms therein specified, according to which a large number of houses, roads, &c., were to be constructed according to the description; and J. was not to sublet or assign, &c., without license. At the time of the execution by J. of the agreement to take this lease, no one was present but C., the solicitor of the lessors, to whom J. said that he had been advised not to sign the agreement, but that he was sure that C. would not let him do anything wrong; to which the reply was that C. was acting for the lessors, and could act for no other party; thereupon J. signed. Up to that time he had not had any legal adviser in the matter; but it being then handed over to his ordinary solicitor to complete, various alterations were requested, most of which were conceded by the plaintiffs, the lessors; but this stipulation as to not subletting, &c., without license, they would not give up or modify. The

defendant alleged surprise, and that he never intended to carry out the building, &c., himself, and would not now do so: but specific performance was, nevertheless, decreed. A surveyor is a competent adviser in the matter of a building lease; and a lessee, who has had the assistance and advice of a competent surveyor, cannot complain of surprise. An intending lessee cannot throw any responsibility upon the solicitor of the lessor, though no other party be present at the time, by a simple appeal to the effect that "he was sure the solicitor would not let him do anything wrong." There is nothing unreasonable in a covenant not to sublet without license, or in a proviso for re-entry on the whole premises on breach of any covenant in the lease. *The Haberdashers' Company v. Isaac*, 3 Jur. N. S. 611.

SPECIFIC PERFORMANCE [vol. 3, pp. 43, 63, 121, 277, 278].—*Railway Company—Contract for sale of books, &c., at the stations—Construction—Declaration—Injunction.*—The following is a special case, but it may not be useless to the practitioner. Where a bill prays not only specific performance of an agreement in a deed, but a declaration of certain rights, and the construction of particular parts of the deed, a court of equity is not in the habit of granting such declaration of rights, or construction, except so far as it may be necessary in order to provide against the infringement of the particular agreement. The Eastern Counties Railway Company entered into an agreement with the plaintiffs, demising to them for ten years the right of posting and exhibiting advertisements in the company's second and third-class carriages, and in the stations on the line and branches of the railway, for the plaintiffs' sole and exclusive right to sell books, &c., at such of the stations of the company as the plaintiffs should think fit for the purpose, and of the using the bookstalls thereat respectively. The defendants also covenanted that all books, &c., sent by the plaintiffs to be sold, posted, affixed, or exhibited, or published, pursuant to the licenses or privileges thereby granted, should be conveyed over all or any portions of the specified lines of railway and branches to any station of the company, free of any charge whatever. The plaintiffs filed a bill for the specific performance of the above-stated contract; for a declaration as to the rights of the parties upon the agreement with reference to the sale of books, &c., at the stations of the defendants; for the construction of the agreement as to the erection of additional bookstalls by the plaintiffs; for an injunction; and for further relief: Held, that, as to the sale of books, &c., at the stations, the agreement contemplated only the sale of the plaintiffs' books at the defendants' stations, to persons

actually going to travel on the defendants' railway, or to their friends coming to the stations to meet them; that the court could not make any declaration that the agreement entitled the plaintiffs to place bookstalls in any of the defendants' stations, where bookstalls did not exist; but that as to the right of retaining unaltered existing bookstalls, &c., the plaintiffs were entitled to an injunction and relief. *Holmes v. The Eastern Counties Railway Company*, 29 Law Tim. Rep. 311.

SPECIFIC PERFORMANCE.—*Parol agreement for a lease—Part performance—Specific performance—Breach of covenant, evidence as to conflicting.*—The decision of V. C. Stuart in the following case, noticed in vol. 3, pp. 311, 312, has been affirmed by the Lords Justices:—In this case, specific performance of an agreement for a lease was decreed at the instance of the lessee in possession, although the defendant alleged that there had been breaches of the proposed covenants that would entitle him to re-enter, the evidence being conflicting on this point. Defendant's right of action on the covenants provided for. *Pain v. Coombs*, 3 Jur. N. S. 847; 3 Law Chron. pp. 311, 312.

FREEHOLD GROUND-RENT.—*Reversion—Power of distress—Determination of landlord's title—Estoppel—No tenure on terms of years—Reversion not created.*—L., having a term of ninety-nine years, with a covenant that he may within twenty years purchase the fee, demises to F. for ninety-nine years and a half, at a ground-rent, and then acquires the fee. The ground-rent was put up for sale described as "a freehold ground-rent issuing out of lands on lease, which will expire in December, 1922," being the expiration of the ninety-nine years and a half term: Held, that the title was too doubtful, in reference to the remedies which the purchaser would have for enforcing the rent, to be forced on an unwilling purchaser. Under such a description the purchaser has a right to expect a power of entry and distress in case of non-payment. No tenure can be created by a mere termor. Though a tenant cannot deny his landlord's title, yet he may confess and avoid it—i. e., admit that his landlord had a right at the creation of his lease, but that it has since that time determined. No estate by way of estoppel passed to F. upon L., becoming in manner aforesaid seised of the fee-simple in the premises (*Langford v. Selmes*, 3 Jur. N. S. 859). In his judgment in this case, V. C. Wood thus explained himself: "The question here is, whether there is any reversion, by virtue of which the present purchaser would have a right to proceed by distress in case the rent of £6 should fall into arrear. It is quite clear that a termor, who by express words demises the lands for a term longer than his own,

parts thereby with his whole interest, and the under-lessee will thenceforth hold of the original lessor during the residue of the original lease. But the argument was, that when the under-lessor acquired the fee-simple from the original lessor, then by estoppel an interest would pass to the under-lessee, by virtue of which the under-lessee, on the expiration of the original lease, would hold of the under-lessor for the surplus months and days. There is no authority for such a proposition, except *Gillman v. Hoare* (1 Salk. 275), and that is contradicted by the subsequent report of the same case in 3 Salk. 152. That case, therefore, is, according to the latest view taken of it, an authority the other way; but I should wish to place little or no reliance upon it at all. In the note to *King v. Wilson* (5 Man. and Ry. 156), by the learned editor, Mr. Serjeant Manning, he considers the question whether, as terms of years are not within the Statute *Quia Emptores*, there would not be a tenure created where there had been a demise by a termor of the whole term by way of under-lease, although there was no appreciable or substantial interest, by way of reversion, in the termor. But he himself suggests a doubt whether terms of years ever had any tenure attached to them, except as that termors held of some persons holding an estate of freehold; and I think it would have excited much astonishment at the time of the statute if it had been suggested that a mere termor could in any way create a tenure between himself and his sub-grantee for years. A termor who sublets has, indeed, a reversion in him, but he does not create that reversion; it is part of his lessor's interest still in the termor." *Langford v. Selmes*, 3 Jur. N. S. 859.

AGREEMENT—*Reference to another writing*—*Statute of Frauds*—*Parol evidence to show what document*—*Agreement sent to solicitor to reduce into form, final and binding*—*Specific performance*—*Necessary collateral circumstances not mentioned*.—Where by an agreement in writing, signed by the party to be charged, something not expressed on the face of it is agreed to be done; and what is to be done is included in another writing, parol evidence may be admitted to show what that other writing is, so that the two documents together may constitute a binding agreement within the Statute of Frauds. Where parties enter into an agreement, they are not less bound by it because they send it to a solicitor to reduce it into form; but the presumption is, if they send it without having previously arranged to that effect, that they do not mean to bind themselves until it is reduced into form. Per Lord St. Leonards: It is no objection to the specific performance of an agreement that collateral circumstances necessarily flowing out of the agreement are not

mentioned in it. *Ridgway v. Wharton*, 5 Week. Rep. 804; 29 Law Tim. R. 390.

COURSES OF LAW STUDIES.

(Continued from p. 82).

Struggle between commercialism and feudality.—From the period of the establishment of the feudal polity in England, in the reign of William the Norman, there seems to have been kept up a sort of constant struggle between the spirit of *commercialism* on the one hand, and that of *feudality* on the other; and the consequent operation of these two grand principles is to be traced in every part of our law of landed property. The construction of testamentary alienation, for example, was originally adopted upon a purely commercial principle, and in relaxation of the rigour of the feudal system, which had a direct tendency to take lands out of commerce, and to render them inalienable. But here, again, the operation of a feudal principle interfered, and required [until the 1 Vic. c. 26], a seisin in the devisor, analogous to that of the feoffor or grantor in the case of alienation by deed; so that by the law of England, a will or devise of lands (which does not operate by way of appointment of an heir generally, as in the Roman law, but by way of legal conveyance of the lands themselves) did not operate on any freehold lands, of which, at the time of making the will, the party had not this species of seisin. [But now (1 Vic. c. 1 s. 24), a will is construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the testator's death, unless a contrary intention appear (1 Law Chron. 297).] It is the same in the proposition, secondly above-mentioned, respecting the heir: when lands were allowed to be freely aliened, for the sake of commerce (for which property is chiefly valuable), it seemed to follow, as a necessary consequence, that they should also be attached for the debts and other incumbrances of the ancestor, upon the same principle. But here, again, the operation of the feudal law interfered; and, upon the principle "that the heir claimed nothing from the ancestor, but came in under the original feudal grant," it was held, that he should not be *generally* liable, like the executor, to the ancestor's debts of every kind, but only to debts of record, and debts by specialty, in which the heir was named; and the same distinction continued, under certain qualifications, to prevail until a very recent period. And so in the two other examples which have been mentioned. The feud was made "*generally*" heritable in *relaxation* of the rigour of the feudal system; but the restriction that the father

should not succeed otherwise than collaterally, and the total exclusion of the half-blood, were the consequences of *purely feudal principles*.

Releases—Leases in futuro—Rents—Conditions.—If it is necessary that this *demonstrable quality of the doctrines of our common law* should be elucidated by any further examples, I would ask, upon what principle is it that a release, which is a discharge of a bond before the day of payment, is no discharge of a rent? (Co. Litt. 292, b.)—that a lease to commence at any after period, if made for years, shall be good, but if made for life, would formerly have been void? (Co. Litt. 46, b.)—that the enlargement of a rent by release or confirmation, is to be understood only of rents *in esse*, and not of newly created rents? (Co. Litt. 308, a. b.)—or, lastly, that a condition, “that if the donee die without issue, the donor and his heirs may enter,” shall be void and of no effect; but if the condition be, “that if the donee discontinue and die without issue, that then the donor and his heirs may enter,” this shall be a good condition and binding upon the parties?

The release doctrine explained.—In the first place, let us take the release, which is a discharge of a bond, but not of a rent, before the day of payment; and yet the obligee can no more bring an action for the debt on bond, than the lessor can for the recovery of the rent, before the day of payment; and, consequently, there is an apparent difficulty in this instance, which is not to be cleared up by explanation, and the help of reasoning discussion. As for example: a bond imports an actual or present debt; in the language of the law, it is *debitum in presenti quamvis solvendum in futuro*. There is here then a right, although a dormant or suspended right, in the obligee to a thing certain, and of which his release is, therefore, a sufficient discharge. And so it is in all similar cases; as in that, for instance, of the release of an action by an executor before probate, which is a good release; and yet, before probate, the executor can bring no action (1 Law Chron. 106—108). But otherwise it is in the case of a rent. Why? Because a rent, before the day of payment, is only a debt accruing, and not a debt accrued. There is here no dormant or suspended right of action in the lessor to a thing certain, but, on the contrary, the thing itself is uncertain, future, and contingent. For, since the rent is to be paid out of the profits of the land, if the tenant be evicted before the day of payment, the rent will be avoided altogether. It is clear, then, that a release of all actions can be of no effect to extinguish a rent before the day of payment; because, at the time of the release, the consideration for which the rent was to be given—viz., the future enjoyment of the land—was not executed. The rent which is here spoken of is a re-

served rent, or rent incident to the reversion; for where a rent does not attend the reversion, but is in gross, a release in that case does discharge all future payments, because the rent is due only by the contract. And so it is in the case of a breach of covenant, upon the same principle. The covenantee may release all actions, &c., without discharging the covenant. And so, again, in the case of an annuity (Co. Litt. 292, b.). The distinction which is here taken is between a *future right*, and a *right to take effect in future*; the latter of which may be released, &c., but not the former. As where there were father and son, and in the lifetime of the father, who was disseised, the son made a release to the disseisor of all his right, &c., and afterwards the father died. Upon the death of the father, it was lawful for the son to enter against his own release; because, at the time of the release made, he had no right in the land, but the right descended to him at an after-period, by the death of the father (Litt. sect. 446). So, again, in the case Lord Coke puts of the plaintiff in an action of debt before judgment, releasing all demands to the bail: he is not barred afterwards, upon judgment being given, from taking out execution against the bail; because, at the time of the release, he had but a *possibility*, and neither *jus in re* nor *jus ad rem*. The duty commences upon an after-consideration, and, therefore, cannot be released beforehand (Co. Litt. 265, b.). But where the husband made a lease for life and died, and afterwards the wife released to him in the reversion, this was a good release of her right of dower, although she had no cause of action against him, *in presenti* (Co. Litt. 265, a.), but only a suspended right of action until he entered and became tenant of the land (Co. Litt. 34, b.).

Releases of future rights.—With respect to what is above said as to future rights not being capable of release, it is provided by the 8 & 9 Vic. c. 106, s. 6, that a contingent, an executory, and a future interest and a possibility, coupled with an interest in any tenements, &c., and a right of entry, immediate or future, therein, may be disposed of by deed. But this does not affect the case put of the son's release to the disseisor; for the enactment does not extend to the hope of succession of an heir or next of kin, or to expectancies under (then) unexecuted instruments or the wills of living persons.

Leases in futuro.—The second proposition turns upon the distinction, which has been already noticed, between the *feudal* and *commercial* nature of real or landed property. Under the feudal system, the proper feudatory or freeholder had always his estate for life, at least, and was regularly invested with it by the public and solemn act of *livery of seisin*, for notoriety-sake; as well that the rightful claimant might know against whom to bring his action, in the

case of a disputed title, as also that the lord might run no risk of being defrauded of his feudal fines and services. It became then impossible, from the very nature and constitution of these estates of freehold, at the common law, that they should be allowed to take effect at any after-period; for that would be to suppose a man to retain the possession in himself, after having delivered that same possession to another; *quod esset absurdum*. But on the other hand, the ceremony of investiture, by *livery of seisin*, was held to be unnecessary, under the feudal system, to the creation of estates *for years*; for the tenant for years, or, as he is sometimes called, the termor or tenant of the term, was considered as no other than the bailiff or *locum tenens* of the freeholder; and, therefore, estates for years being suffered to enure as matters of mere contract, there could be no objection to their taking effect either immediately or at any after-period, as might happen to be agreed upon between the parties.

Enlargement of rent-charge.—Thirdly, let us suppose A., having a rent-charge in fee out of B.'s lands, grants it to C. for a year; he may afterwards enlarge it, by release or confirmation, to C. for any number of years, or for life, or otherwise. For every subsequent augmentation which is so made of C.'s estate in the rent, is derived out of the reversion which is in the grantor of that same rent. But, if A. grants a rent-charge to C. out of his own land, there is evidently no remainder over, or reversion of this rent, out of which any further augmentation can be derived. In the former case, there was a rent *in esse*, the reversion of which was in the grantor; but, in the latter, the grant from A. to C. was not of a part of what A. himself had, but of a *newly-created rent*; and, consequently, though A., by a new deed of grant, may create a new rent-charge, to take effect upon the surrender or determination of the old, yet of the old rent-charge he can make no further enlargement. For out of what is he to enlarge it? There is no reversion or remainder over, upon which a release or confirmation can operate *pro incremento*.

Condition of re-entry on estate-tail.—Lastly, suppose an estate-tail to be created with a condition, that if the donee die without issue, the donor and his heirs may enter; the condition is void. Why? Because the donor, in such case, might have entered at any rate; and words which provide for no more than must necessarily take place without their intervention, are nugatory and of no effect. Hence, the legal maxim, *expressio eorum quæ tacite insunt nihil operatur*. "And, therefore," says Lord Coke, "the widow whom it was intended to defraud by these words, shall have her dower" (Co. Litt. 224, b.). But where the condition was, that if the donee dis-

continued, and died without issue, the donor and his heirs might enter, the condition was good in law, because the donor in that case could not have entered otherwise than by force of the condition, but would have been driven to the expensive and dilatory process of a *formedon in the reverter*. The expense and delay attending a *formedon*, frequently prevented a tenant in tail from resorting to it to assert his right. In the course of time the period for asserting it elapsed; and thus the discontinuance virtually proved a bar to the entail [the *formedon* was abolished by the 3 & 4 Will. 4, c. 27, s. 36].

Copying precedents (ante, p. 78)—*Maxims and pleadings*.—Having thus exemplified that the theory of our common-law learning is capable of demonstration and knowledge (and of which there will necessarily occur many further specimens in the sequel of this inquiry), it becomes us, in the next place, to consider to what course of reading we ought to apply ourselves, or what system of education to follow, in order to be duly instructed in it. It is, confessedly, of the greatest importance, that the law student should be well versed in classical learning, and especially in logic; as appears from the very nature of the sources from which the arguments and proofs of the common law are principally drawn, and which, for the satisfaction of the reader, will be presently briefly recapitulated. But how humiliating must it be to a man who has been thus liberally educated, according to the usage of our universities, to have to sit down afterwards, for two or three years, at the desk in an office, to copy precedents, in subservience—as Blackstone (Introd. p. 32) calls it—to attorneys and special pleaders! Or, supposing the drudgery of the thing to be left quite out of the question, I would ask what in the name of fortune is he likely to gain by it? The knowledge of the minutæ of practice? It may be so; but these are secondary considerations, and of no further use or consequence, even to the student who intends to follow the law as a profession, than so far only as they have their foundation in particular principles or rules of law, which demand from us the application of an intelligent mind, and not the labour of our hands in copying precedents. Neither will he have the consolation, in the meantime, of becoming even a tolerable pleader. For pleading, too, is matter of science and of liberal study, and, like the law itself (of which it has not unaptly been called the handmaid), is demonstrable, through all its branches, by the same unsophisticated conclusions of plain reason and common intendment.

Sources from which the arguments and proofs of the common law are principally drawn.—The sources from which the arguments and proofs of the common law are principally drawn, are as follows:—

1. *Maxims, &c.*—The received *legal maxims*, or rules and principles, which are described to be a sort of common ground in the nature of postulates or axioms. There are, necessarily, certain "data" required in the explanation of the logic of the law, as in that of the logic of every other science; *quia contrà negantem principia non est disputandum*. Thus we say the Sovereign can do no wrong; no man is bound to accuse himself; the law admits no presumption of injuries (*Injuria non presumitur*, Co. Litt. 332, b.); everything shall be presumed lawfully done, until the contrary is proved (*Omnia presumuntur legitime facta donec probetur in contrarium*, Co. Litt. 232, b.; 3 Bing. 381; 12 M. and W. 251); there is no crime where there is no criminal intention (*Actus non facit reum nisi mens sit rea*, Co. Litt. 247, b.; 7 Term Rep. 514), and so forth.

2. *Judicial records.*—There is another sort of proof drawn from the year books, the judicial records, and other authorities of law. *Res judicata* (says the legal maxim), *pro veritate accipitur* (Co. Litt. 103, a.; 7 Term Rep. 456; 3 B. and Cr. 235); *et à communi observantiâ non est recedendum* (Co. Litt. 186, a.; Wingate, 208); *et minime mutanda sunt quæ certam habuerunt interpretationem* (Co. Litt. 365, a.).

3. *Original writs.*—From the *original writs* (Co. Litt. 73, b.; 280, b.); for these cannot be changed without act of Parliament (Co. Litt. 54, b.), and are, therefore, held to be of great authority for the proof of the law in particular cases (Co. Litt. 93, b.).

4. *Pleadings.*—From the forms of pleading: "For the law," says Lord Coke, "speaketh by good pleading, which is, therefore, said to be, *ipsius legis viva vox*" (Co. Litt. 115, b.).

5. *Entries of judgments.*—From the entries of judgment. For the judgment is ever given by the court upon due consideration had of the record before them (Co. Litt. 39, a.).

6. *Precedents and usages.*—From approved precedents and usages. For that which is commonly used in conveyances is the surest way; and it is so much the safer to follow approved precedents; *quia nihil simul inventum est et perfectum* (Co. Litt. 229, b.; 230, a.). As to the usages of trade, see First Book, pp. 8, 9.

7. *Non-usage.*—From non-usage. For as usage is a good interpreter of law, so non-usage (where there is no example to the contrary) is a great intendment that the law will not bear it (Co. Litt. 81, b.; Litt. s. 108; Dougl. 601). But it must be borne in mind that, as to acts of Parliament, non-user cannot be set up (*White v. Boot*, 2 Term Rep. 274; *Leigh v. Kent*, 3 Term Rep. 364; Co. Litt. 81, b.; 3 Jurist).

8. *Consequences and conclusions.*—From consequences and conclusions of law, where the matter of proof is merely technical. As where it is proved by the pleading, that prescription is by the common law, and not by force of any statute, &c. (Litt. sect. 170). Or where the subsistence of a tenure between the lessor and the lessee for years is proved by the words of the writ of waste (Litt. sec. 132).

9. From the common opinion of the learned in the law. For this is a consequence of the rule of law, *à communi observantiâ non est recedendum; et minime mutanda sunt quæ certam habuerunt interpretationem* (Co. Litt. 186, a.; 365, a.; Litt. s. 697).

10. *Inconvenience.*—From what would be generally inconvenient: *Ab inconvenienti*. For the law was made for the avoiding of inconveniences; and, consequently, where any particular construction of a doubtful point can be shown to be productive of a public inconvenience, it is always a forcible argument, in law, against its being adopted (Co. Litt. 97, b.; 97, a.; 66, a.).

11. *Enumeration or division.*—From reasoning by enumeration, or, as the logicians call it, *à divisione*. As where, in the case of a feoffment, made on condition that the feoffee should pay a yearly rent to a stranger, it is proved that such annual payment is not properly a rent, though so called in the indenture. For if it should be a rent, then must it be either rent-service, or rent-charge, or rent-seck; but it is not any of these, and, consequently, is not properly a rent (Litt. sects. 345, 213; 2 Bl. Com. 41, 42).

12. *Greater and less.*—From the greater to the less: *A majori ad minus*. As where it was argued that the abolished recovery, which was matter of record, and, consequently, of the highest nature, being insufficient to bind him who was in prison at the time of the default made, *à fortiori* he shall not be bound in the like case by a disseisin and descent, &c., for these are but matter of fact and not of record (Litt. sec. 438). So where murder is pardoned, manslaughter shall also be pardoned. Where, by the custom of a manor, a man may demise for life, he may demise to his wife *durante viduitate* (*White lock's case*, 8 Coke's Rep. 70, b.; *Noy's Max.* 6; *Finch's Law*, 7, a., fo. edit.).

And so on the other hand, from the less to the greater: *A minori ad majus*. As where it is argued that livery of seisin within the view, being allowed in the case of a feoffment, which passes a new right, *à fortiori* a seisin within the view shall be allowed for the restitution of an ancient right, which is so much the worthier and more respected in law (Co. Litt. 252, a.; 260, a.).

13. *Impossibility.*—From that which is impossible; *ab impossibili*. As where it is argued that a disseisin

and descent shall not bind him who is out of the realm at the time, from the impossibility (according to common presumption), of his having cognisance of the same (Litt. sect. 440).

14. *End or purpose*.—From the end; *à fine* (Noy's Max. 14). For that which is nugatory in its effect, or to no definite legal end and purpose, the law never requires: as where the tenant for life, with a mediate remainder to himself in fee, granted the remainder to another, he was not required to attorn to his own grant, &c. (Litt. sec. 578; 2 Bl. Com. 72, 288, 290). By the same rule, again, if there were two coparceners, and lands were given in frank-marriage with the one, if these lands were of equal value at the time of the partition, they shall not afterwards be put in hotchpot; for, in that case, the effect of the hotchpot has been anticipated by the gift in frank-marriage (Litt. sects. 273, 277, *et seq.*; 2 Bl. Com. 190, 597).

15. *Uselessness or want of benefit*.—From that which is useless, or of no ultimate benefit to the party. And, therefore, the villein—while tenure in villeinage subsisted (2 Bl. Com. 61, 89, *et seq.*)—could not bring an appeal of mayhem (4 Bl. Com. 314), in which he recovered only damages, against his lord (Litt. sec. 194). For the incapacity to acquire anything for his own benefit was one of the harsh characteristics of the villein's condition, according to the then maxim, "*quicquid acquiritur servo, acquiritur domino*" (Co. Litt. 117, a.).

16. *Absurd or repugnant*.—From that which is absurd or repugnant to common understanding; *ex absurdo*. As if a feoffment were made upon condition that the feoffee should not alien, &c., for such condition would be repugnant to the estate of the land passed by the feoffment (Co. Litt. 223, a.; Litt. s. 360). And so it was where a remainder was limited to commence upon the tenant's aliening; for, in that case, one and the same estate would vest in two several persons at the same instant; *quod esset absurdum* (Co. Litt. 378, a. b., Richel's case).

17. *Contrary to nature*.—From that which is contrary to the course of nature. As if a relief of a bushel of roses is due out of certain lands, and the tenant dies at Christmas, the lord cannot distrain for his relief till the time of the growing of the roses (Co. Litt. 92, a. 1). *Quia lex spectat naturæ ordinem; et impossibile est quod naturæ rei repugnat; et lex neminem cogit ad impossibilia*.

18. *Religion*.—From the order of religion. As when it was shown that if a villein became a monk professed, he could not be reclaimed by his lord, because a man of religion should live according to his profession of religion; and this, if the monk were taken out of his house, he could not do (Co. Litt. 136, b.; Noy's Max. 1).

19. *Presumptions*.—From common presumption. As where the issue in tail was held to be barred by the warranty of a collateral ancestor, upon the common presumption that a man would not unnaturally disinherit his lawful heir, without leaving him some other recompense (Co. Litt. 378, a.; Plowd. Com. 307; Litt. sec. 709; 2 Bl. Com. 301, 302; Bath v. Sherwin, 10 Mod. Rep. 34). Or where the child of a married woman, whose husband is living within the realm, is presumed to be the child of the husband (see Co. Litt. 378, a.; 244, a., n. 2; 2 Steph. Com. 316; 1 Bl. Com. 457, n. 8, by Christian). It was on the principle of common presumption that where a father and child are lost together, the father will be presumed to be the survivor (Stanwix's case, 1 Bl. R. 640; Mason v. Mason, 1 Meriv. 308; as to husband and wife, see Underwood v. Wing, 23 Law Journ. Ch. 982; 1 Jur. N. S. 159).

20. *Lectures and readings*.—From ancient lectures and readings upon different statutes. For these declare what the common law was before the making of the statute; they likewise open the true sense and meaning of the statute; they distinctly set before us one point at the common law, and another upon the statute; they produce authorities, arguments, and reasons for proof of the opinion of the reader, and for confutation of objections against it; and, lastly, they defeat subtle inventions to creep out of the statute (Co. Litt. 280, b.), and so forth.

It suffices to have thus generally explained that the knowledge of the arguments and the reasons of the law, are to be deduced from these and the like sources, in order to show how necessary it is (I repeat Lord Coke's words), that he who comes to the study of the common law should come, as Littleton did, from one of the universities, where he may have learned the liberal arts, and especially logic (Co. Litt. 235, b.).

THE MONTH'S SUMMARY.

Sales in market overt.—Sales and contracts of things vendible in open market (including in London ordinary shops), except in the case of the having or stealing, or obtaining by false pretences, followed by a conviction, are valid against persons claiming any right thereto; but not if the sale was out of market overt.

Executors of debtor are bound by the mere issuing of the writ, though the debtor die before its delivery to the sheriff.

Liquidated damages—Penalty.—We have noticed the late cases of Cass v. Thompson (5 Week. Rep. 289; 3 Chron. 303), and Reynolds v. Bridge (26 Law Journ. Q. B. 12; 2 Jur. N. S. 1164; 3 Chron.

48), on the question whether the mention in a deed or agreement of a sum of money to be paid on breach of the contract by any of the parties is to be considered as stipulated and liquidated damages or a mere penalty. In noticing the latter case, a writer in the *Jurist* says:—The judgment in this case justifies, we think, the following deductions:—1. In deciding whether a sum to be paid, in the event of a breach of contract, is to be considered as in the nature of a penalty or as liquidated damages, the real intention of the parties is to be ascertained, and that from the words in the contract itself. Other rules upon the subject are only to assist the courts in ascertaining such intention; 2, the fact that the sum is large, and exaggerated in amount, does not of itself show that it is to be considered as a penalty; 3, the fact that more than one thing is to be done or forborne does not determine the question; 4, if the covenant relates to matters which are not of an uncertain nature and amount—e. g., for payment of a smaller sum, and the damages named in the deed are a much larger sum—it is to be regarded as a penalty; 5, and it seems that if some of the stipulations are of a certain nature and amount, and some are of an uncertain nature and amount, as the sum cannot be treated as liquidated damages in respect of one or more of the stipulations, it ought not to be so treated in respect of the others (per Coleridge, J.; see *Galworthy v. Strutt*, 1 Exch. 659). 6. If the parties intended that there should be a penalty recoverable over and over again for every breach of the covenant, and not that, in case of a single breach, the entire contract should be at an end, and the sum paid for the loss of the whole matter, it will in general be a penalty (per Crompton, J.); 7, if there be a contract containing stipulations, the breach of which cannot be measured in damages, the parties must be taken to have meant that the sum agreed on for its non-performance was to be liquidated damages.

Ornamental timber—Cutting down restrained.—The case of *Micklethwait v. Micklethwait*, stated *ante*, pp. 43, 44, to the effect that the existence of a mansion is not absolutely necessary in order to give the character of ornamental to trees planted or left standing, has been overruled, and it was held that the testator having pulled down the mansion house, the court would no longer protect the trees in the avenue and park as ornamental (*Micklethwait v. Micklethwait*, 29 Law Tim. Rep. 352; 3 Jur. N. S. 765; *ante*, pp. 43, 44; overruled, 5 Week. Rep. 861).

Charity—Mortmain—Almshouses.—A gift by will of money for the maintenance of almshouses, if within a year after the testator's death another person should give land and build the almshouses,

is unobjectionable (*Philpott v. St. George's Hospital*, 5 Week. Rep. 845).

Charity—Right to surplus.—Where the testator gives the whole of his estate to charity, apportioning the rents amongst different charitable objects, if the rents increase, the increase in the gifts shall be in the proportion of the original rents. Where a testator declares his intention to give the whole of some property to charity, but appropriates only a certain part, the court will form a scheme for the application of the remainder (*Beverley v. Attorney-General*, 5 Week. Rep. 840).

Member of Parliament—Privilege as bankrupt trader.—The privilege of Parliament to a member thereof extends merely to freedom from arrest, and does not protect a trader claiming it upon his appearance to a summons under section 78 of the Bankruptcy Act, 1849, from the consequences of not answering or not signing an admission of the debt under sec. 83 (*Anon.* 29 Law Tim. Rep. 362).

Attornment to receiver in Chancery.—An attornment to a receiver appointed by the Court of Chancery does not enure to the benefit of the person who shall ultimately be found to have in him the legal estate (*Evans v. Mathias*, 3 Jur. N. S. 793).

Enrolment of order.—The enrolment of an order will not be vacated, on the ground that it was only an interlocutory, and not a final order (*Williams v. Page*, 5 Week. Rep. 854).

Production of documents—Title ceased.—A party who has once had an interest under a deed is entitled to have its production (*Bugden v. South*, 3 Jur. N. S. 784).

Trustee's costs.—Where there is no estate to be administered, trustees can only have costs as between party and party (*Saunders v. Saunders*, 29 Law Tim. Rep. 840; *ante*, p. 87).

Carriers—Part of way.—If a carrier contracts to carry goods to and deliver them at a particular place, his duty at that place is precisely the same, whether his own conveyance goes the entire way or stops short at an intermediate place, and the goods are conveyed on by another carrier; and the carrier, or his clerk, at the place of destination, is the agent of the original carrier for all purposes connected with the conveyance and delivery, and dealing with the goods, as his own clerk would have been at the place where his own conveyance stops (*Crouch v. The Great Western Railway Company*, 29 Law Tim. Rep. 854; 5 Week. Rep. 831).

Specific bequest—Definition of.—A specific bequest is something that the testator directs to be enjoyed in specie, because the very word specific means that the thing is to be enjoyed in specie (per Lord Chancellor, in *Fielding v. Preston*, 5 Week. Rep. 352; 29 Law Tim. Rep. 837).

Conversion—Lessee with option to purchase fee.—Where a lessee, with an option to purchase the fee, makes the purchase after the death of the lessor, the realty is thereby converted into personalty as between those claiming under the lessor's will (*Collingwood v. Row*, 3 Jur. N. S. 785).

Public Health Acts.—A rate made under the Public Health Act is not invalid, because it has not been duly published (*Le Feuvre v. Miller*, 29 Law Tim. Rep. 844).

Illegitimate child born in Scotland.—Where the father and mother of an illegitimate child in Scotland afterwards marry, the child cannot, in England, be lineal heir, nor have any lineal ancestor; and the 3 & 4 Will. 4, c. 106, the Inheritance Act, has made no difference in this respect (*Re Don*, 5 Week. Rep. 836).

Injunction—Ejectment.—A writ of injunction cannot issue, in an ejectment, out of a common law court (*Baylis v. Legros*, 3 Jur. N. S. 795; *ante*, p. 94).

Settlement by female minor of real estates.—A female infant cannot (except under the late act, 2 Chron. pp. 62, 267; 3 Id. 215, 252) bind herself by a marriage settlement so far as her real estate is concerned. What would be the husband's rights if he discovered this after the marriage, &c., was discussed in *Campbell v. Ingilby*, 5 Week. Rep. 837.

Feme covert—Separate examination.—No person connected with or concerned for the husband ought to be present when a married woman's examination as to her consent is being taken by commissioners (*Re Bendyshe*, 29 Law Tim. Rep. 841).

Bankruptcy—Proof—Bill—Part payment [*ante*, p. 57].—The holder of a bill of exchange, who, prior to proof, has received part payment from the drawer, can prove in bankruptcy against the estate of the bankrupt acceptor for the balance only, due at the time of making the proof (*Re Houghton*, 3 Jur. N. S. 753; *ante*, p. 57).

Compromise with debtors to bankrupt's estate.—Every creditor has a right to intervene and object to a compromise proposed to be entered into by the bankrupt's assignees with any debtors to the estate. The court may direct a compromise to be carried into effect, though some of the creditors oppose the compromise (*Exp. Hirst*, 29 Law Tim. Rep. 163).

Reputed ownership—Landlord and tenant—Machinery.—Machinery in a mill, and demised to a tenant therewith, who covenanted to keep it up during the term to a certain value, is in the order and disposition of the tenant on his becoming bankrupt, with the consent of the true owner—viz., the landlord—and the bankruptcy assignees are entitled to remove same (*Shuttleworth v. Hernaman*, 5 Week. Rep. 853; 29 Law Tim. Rep. 389).

Winding-up acts—Contributory—Transfer to minor.

—A shareholder transferring his shares to a minor is a contributory, though the minor has not repudiated the transfer (*Re Reid*, 5 Week. Rep. 854).

Fraudulent preference—Pressure—Knowledge of debtor's difficulties.—It is immaterial, in impeaching a deed for fraudulent preference as against a creditor, to show that the creditor knew of the difficulties of his debtor, provided that the creditor can show pressure exerted on the debtor by him (*Davison v. Robinson*, 3 Jur. N. S. 791).

RECENT STATUTES (20 & 21 VIC.).

CAP. I. CINQUE PORTS.—This statute recites sec. 5 of the 18 & 19 Vic. c. 48 (see vol. 2, p. 148), and enacts, that that section is not to apply to any district until her Majesty shall have granted a commission of the peace, and a court of quarter sessions thereto.

CAP. III. PENAL SERVITUDE—TRANSPORTATION ABOLISHED.—This is an act to amend the 16 & 17 Vic. c. 99, which substituted in certain cases other punishment in lieu of transportation. It repeals secs. 1 to 4 of that act, and by sec. 2 the long-established system of transportation is abolished, and in its place penal servitude is substituted. Some other consequent provisions are made by the statute, but it is only necessary to give the enactment in sec. 2, which provides that "after the commencement of this act no person shall be sentenced to transportation; and any person who, if this act and the said act had not been passed, might have been sentenced to transportation, shall, after the commencement of this act, be liable to be sentenced to be kept in penal servitude for a term of the same duration as the term of transportation to which such person would have been liable if the said act and this act had not been passed; and in every case where, at the discretion of the court, one of any two or more terms of transportation might have been awarded, the court shall have the like discretion to award one of any two or more of the terms of penal servitude which are hereby authorised to be awarded instead of such terms of transportation: provided always, that any person who might at the discretion of the court have been sentenced either to transportation for any term or to any period of imprisonment, shall be liable, at the discretion of the court, to be sentenced either to penal servitude for the same term or to the same period of imprisonment; and in any case in which before the passing of the said act sentence of seven years' transportation might have been passed, it shall be lawful for the court in its discretion to pass a sentence of penal servitude of not less than three years.

CAP. V. INCOME TAX—LIFE INSURANCE.—This act merely continues the 16 & 17 Vic. c. 91 (for the abatement of Income-tax in respect of insurance on lives), until the 6th of April, 1860.

CAP. XIII. SITES FOR WORKHOUSES—LUNATIC ECCLESIASTICAL CORPORATION SOLE.—This act is entitled "An Act to Facilitate the procuring of Sites for Workhouses in certain cases." Its real object is to make a provision for the acquisition of sites for workhouses, *when the land belongs to an ecclesiastical corporation sole unsound in mind*. It recites the 5 & 6 Will. 4, c. 69, which was passed in 1835, in order to remove some difficulties as to the sale and purchase of workhouses and other parish property, under the then existing law; and (among other things) it enabled any lay or ecclesiastical corporation, aggregate or sole, to dispose of, by way of absolute sale or exchange, any lands or buildings for the purpose of a workhouse, or for any other purpose relating to the relief of the poor approved by the Poor-law Board: and it contained provisions for effecting such a transaction, when the owner of the land or building required was "a person idiot, lunatic, or under any other disability," through such person's guardian, trustee, husband, or committee; but it failed to provide for the case of the land or building desired belonging to an ecclesiastical corporation sole (a bishop, for example, or a benefice), and the person for the time being entitled to such land or building in virtue of his office happening to be insane. The new act provides for such a contingency, by enacting (s. 1), that, in the event of the guardians of any union or parish—or the managers of any of the school districts established under 7 & 8 Vic. c. 10, s. 40 (as amended by 11 & 12 Vic. c. 82, and 13 & 14 Vic. cc. 11, 101), for the management of infant poor of sixteen years of age and under, chargeable, deserted, or placed in the school of the district by their parents or guardians—being desirous, for any of the above purposes, to purchase or exchange land or building belonging to any ecclesiastical corporation sole, the person entitled thereto for the time being having been found to be insane upon a commission issued under 16 & 17 Vic. c. 70 ("The Lunacy Regulation Act, 1853"), such guardians or managers may petition the Lord Chancellor for leave to purchase or exchange the same accordingly; and, on such petition, the Lord Chancellor may make such order as he shall think proper. But his order, authorising the sale or exchange, will not be sufficient for the purpose, unless there be also obtained, in all cases, the consent of the ordinary having jurisdiction over such corporation (i. e., in the case of a parson, the consent of the bishop; and of a bishop, of the archbishop of the province); and, in certain cases, other

consents also. Thus—1. In the case of an incumbent of a benefice, the consent also of the patron. 2. In the case of the land or building desired having been purchased, or become appropriated, or annexed to a benefice, by or with the consent, concurrence, or direction of the governors of Queen Anne's Bounty (as to which see 2 & 3 Ann. c. 11), the consent also of such governors. In either of these two cases, the proceeds from the transaction are, by s. 2 of the act under discussion, to be paid to such governors, and the receipt of their treasurer is a sufficient discharge; and the proceeds are, as the general rule, and subject to any stipulation or agreement as to the expenses of the sale or exchange, to be appropriated by the governors to the particular benefice to which the land or building belonged. On the other hand, in all other cases, the proceeds (by s. 1) are to be paid into the Bank of England, to be placed to the Accountant-General's account to the credit of the corporation sole from which the land or building is bought or exchanged; and thenceforth (by a provision of 5 & 6 Will. 4, c. 69, which is incorporated into the act under discussion with respect to these cases), the Court of Chancery may, on petition or motion of any claimant, order summarily the investment of such proceeds in the purchase of real estates or of public funds; and the rents and dividends to be distributed according to the respective interests of the claimants; and may make such other order in the premises as shall seem reasonable.

CAP. XIV. JOINT-STOCK COMPANIES AMENDMENT ACT.—This act is entitled "An Act to amend the Joint-Stock Companies Act, 1856." There is another act of the last session (cap. 80) passed also to amend the act of 1856, which will be hereafter noticed. It will not be possible to give the act *in extenso*, but the following abstract and statement will render its provisions intelligible.

Non-registry or non-incorporation—Full liability.—The act repeals the 4th section of the former act, and enacts that if more than twenty persons carry on a trade or business without being registered under that act, or otherwise being legally incorporated, each of the partners shall be severally liable for all the debts of the partnership.

Converting shares into stock.—A limited company is empowered to convert its paid-up shares into stock (sec. 5), notice thereof being given to the registrar, and a register of the holders being open to inspection at any time (sec. 7).

Copies of articles, &c.—A penalty of £1 for each offence is inflicted by sec. 10 for not forwarding to shareholders copies of the memorandum and articles of association.

Arresting shareholder.—Power is given to arrest a

shareholder about to abscond, or to remove or conceal his property (sec. 11).

Calls, specialties.—Calls on contributories are made specialty debts (sec. 18).

Official liquidators.—Official liquidators may be appointed on behalf both of creditors and contributories (s. 14), and they are empowered to compromise for payment of debts to the company (s. 16), and may accept shares as a consideration for the sale of the property of the company (s. 17), and call general meetings (s. 18). A penalty is imposed upon liquidators not reporting the dissolution of a company to the registrar (s. 20).

Previous acts apply to non-registered companies.—The previously-existing Joint-Stock Companies Acts are to continue applicable to all companies formed and registered under them, if they are not registered under the Act of 1856.

Security for costs.—When a limited company is plaintiff in any action or legal proceeding, any judge having jurisdiction in the matter may order security to be given for costs, and stay proceedings until such security be given (s. 24).

Registration of previous companies.—Sec. 25 legalises the registration of previously formed companies, registered after the 3rd Nov. 1856, and sec. 27 empowers all such companies not yet re-registered, to do so on or before the 2nd Nov. 1857, under the penalty of being incapable to sue or of paying a dividend, and a further penalty of £5 per day on each director or manager.

Registering shares as stocks.—Any existing company may register its paid-up shares as stock instead of as shares (s. 30).

List of shareholders.—The list of shareholders to be delivered to the registrar, may be made up to six days before the day of registration (s. 31).

Re-registered company—Articles.—A company having a deed of settlement, and re-registering with articles of association, is not authorised to alter any of the provisions of the deed of settlement; and Table B. is not to apply to any such company unless adopted by special resolution (s. 33).

Title of act—Conversion of capital into stock.—A somewhat more detailed statement of the principal enactments of the act will give the reader a more precise notion of the effect of the act. After providing that the new act is to be cited as "the Joint-Stock Companies Act, 1857," and that it and "the Joint-Stock Companies Act, 1856" (which is throughout called the *Principal Act*), shall, so far as is consistent with the context and objects of such acts, be construed as one act, there are some provisions respecting the conversion of paid-up capital into stock, and extending the provisions of the original act of 1856,

with reference to shares, to the capital when so converted in stock.

Rectification of register.—Sec. 9 extends the power of the court, under sec. 25 of the *Principal Act*, with reference to disputes about the register, and enables it to decide on any question which it may be necessary or expedient to decide for the rectification of the register relating to the title of any person, party to such proceeding, to have his name entered in or erased from the register, whether the question arises between him and the company, or between him and any other holder or alleged holder of shares or stock. Sec. 10 imposes a penalty on the company for not complying with the 27th section of the *Principal Act*.

Winding-up by court (Part 3 of Principal Act)—Arrest of contributory—Specialty debts.—Secs. 11, 12, and 13 relate to winding-up. Sec. 11 gives authority to the court winding-up a company, on the application of the official liquidator, to issue a warrant for the arrest and seizure of the property of any contributory about to quit the United Kingdom, or otherwise abscond, or to remove or conceal any of his goods and chattels, for the purpose of evading payment of calls, or avoiding examination in respect of the affairs of the company. Any contributory, however, so dealt with may (by s. 12) apply to the court for his discharge or for the redelivery to him of his property; and such order shall be made as seems just. By s. 13 of the same act, all calls made on contributories under s. 82 or s. 104 of the *Principal Act* are to be deemed, in England and Ireland, specialty debts from the contributory to the company.

Certificate of incorporation.—The 4th sec. provides, that on payment of 5s. the registrar shall give a certificate of incorporation of any company to any person applying for it, and then says that such certificate shall be admissible in evidence in like manner as the certificate of incorporation required to be given by the *Principal Act*.

Security for costs in certain cases.—It is provided by s. 84 of the act under discussion, that where a limited company is plaintiff or pursuer in any legal proceeding, any judge with jurisdiction, if he has reason to be satisfied that the assets of the company will be insufficient to pay the costs of the defendant, if successful—may require security to be given for such costs, and, in the meantime, may stay all the proceedings.

Consequences of persons trading in partnership contrary to acts.—Sec. 4 of the *Principal Act* made the members of any partnership having gain for its object, and consisting of more than twenty persons, severally liable for the debts of the concern, unless forming a company registered under the act, or

being within the exceptions of that clause; this was supposed to leave it doubtful whether companies or partnerships formed for the purpose of some profit or advantage to the individual members, but not to the company at large, were within the provision, as in the case of the companies which formed the subject of *Reg. v. Whitmarsh* (15 Q. B. 600; 15 Jur. 7; 19 L. J., Q. B., 469), and *Bear v. Bromley* (16 Jur. 450; 21 L. J., Q. B., 354). That section has therefore been repealed, and re-enacted in an altered form (sec. 8), the words now being, "having for its object the procurement of gain to the partnership." So that that point is set at rest. There is also an alteration in the description in the second class of trading societies allowed by this section, on which we may possibly have to comment by and by; that class is now described as "*companies incorporated or otherwise legally constituted by or in pursuance of any act of Parliament, royal charter, or letters-patent,*" instead of, as in the repealed section, "*companies authorised to carry on business by some private act of Parliament, or by royal charter or letters-patent.*"

Official liquidators (Part 3 of Principal Act).—Secs. 14 to 21 relate to official liquidators. By secs. 14 and 15 they are for the future to be appointed with reference to, and as the representatives of, both the creditors and the contributories. By ss. 16, 17, and 18 they are intrusted with additional powers to those given them by the Principal Act, with regard to compromising debts, calls, and claims, selling the property of the company in the course of liquidation, and calling together general meetings of such company. After these provisions as to official liquidators, there is an enactment in the new act (s. 19) to enable the court winding-up a company to adopt, partly or wholly, proceedings previously taken under a voluntary winding-up. By s. 20, they are liable to a penalty for failing to report to the registrar the decree or the resolution declaring the dissolution or the fair winding-up of any company they have been engaged in liquidating, either under the court, or voluntarily; and (by s. 21) constituting them trustees, under 10 & 11 Vic. c. 96—the act of 1847 for securing trust funds, and for the relief of trustees—with regard to any property of the company they shall find themselves unable to distribute at the expiration of twelve months from the dissolution of such company, owing to the death or absence of the parties entitled thereto.

Repeal of statutes (Part 5 of Principal Act).—The only sect. under this head is the 23rd, which repeals the 107th section of the Principal Act. We may remark that this 107th sec. repealed the 7 & 8 Vic. c. 110 (the Joint-Stock Companies Act, 1844), the 10 & 11 Vic. c. 78 (for the amendment of the act last mentioned), and the 18 & 19 Vic. c. 133 (the

Limited Liability Act, 1855)—but, so far as regarded any company completely registered under 7 & 8 Vic. c. 110, not till such company registered under the Principal Act. Under this section a difficulty arose as to insurance companies, they (together with banking associations, which are now regulated under another act of the present session—viz. c. 49) being expressly excepted from the operation of the Principal Act. Hence the 23rd section of the new act, after repealing the 107th section of the Principal Act, proceeds to enact, with reference to the three acts above mentioned, that they "shall be deemed to have been, and still to remain, unrepealed as to any company completely registered" (i. e., under 7 & 8 Vic. c. 110) "which has not obtained registration under the Principal Act, until such time as such company obtains registration under" the Principal Act, or the new act, "but from and after such time, and not before, shall be repealed as to such last-mentioned company; and, subject as aforesaid," all the said three acts, "shall be repealed." It was, however, later in the session discovered that that section did not meet the case of insurance companies, and therefore was passed 20 & 21 Vic. c. 80, called (as well as the above new act) "An Act to amend the Joint-Stock Companies Act, 1856." By this latter act it is enacted, that neither the Principal Act nor the above new act shall be deemed to have been repealed as respects insurance companies already or to be hereafter formed under 7 & 8 Vic. c. 110, or any act amending the same, or relating to such companies. There is, however, the following provision as to certain particular insurance companies:—Provided, that, if any insurance company formed under 7 & 8 Vic. c. 110, or the directors of, or shareholders in, any such company, have, during the interval between the passing of the Principal Act and the above new act, acted as if the 7 & 8 Vic. c. 110, had, as to such company, been repealed by such Principal Act, then, "so far as affects the mutual rights and relations of the said company, its directors and officers, and late or present shareholders, and so far as affects any penalties which the said company, or its directors, officers, or shareholders may have incurred by non-observance of 7 & 8 Vic. c. 110, the said 7 & 8 Vic. c. 110, shall, as regards the actions of such company, its directors and shareholders, during such interval as aforesaid, be deemed to have been repealed." The result of all this seems to be, that (whatever may have been intended by the Principal Act) the 7 & 8 Vic. c. 110, and 10 & 11 Vic. c. 78, are still the statutes under which all existing insurance companies are regulated, and under which future ones are to be formed. It is to be remembered that companies for assurance are expressly excluded from the Limited Liability Act, 1855.

Temporary provisions for registration of old companies (Part 5 of Principal Act).—The 27th section of the act extends the time for the registration of the old companies to the 2nd November, 1857, by which time they are required to be registered; and the 28th section, in order to compel them to be so registered, provides the following penalties in case of default—first, that the company shall be incapable of suing in any court of law or equity; secondly, that no dividend shall be payable; and, thirdly, that each director or manager of the company shall be liable to a penalty of £5 per day during the time of such default; but, except in these respects, the company will remain unaffected, and subject to the provisions of the old act, which for that purpose is to be considered as unrepealed until it is so registered. Also, by the 25th section, the registration of companies which were registered under the act of 1856, after the 3rd November, but before the passing of that of 1857, is to be considered as effectual as if it had taken place before that day: so that in these two respects the doubts which existed are entirely removed. Then the 29th section provides for the case of other lawfully constituted companies, and in substance re-enacts the latter part of the 110th section; but the description of companies which may be registered at their own option is slightly varied; it is now, “any company consisting of seven or more shareholders, *having capital of fixed amount, divided into shares, also of fixed amount, duly constituted by law prior to the passing of the act, and not being a company hereby required to be registered.*” There was another question of some importance arising on the construction of the 113th section, which made the deed of settlement or charter of an existing company, when registered anew under the Principal Act, “regulations of the company within the meaning of the act,” and declared that all the provisions of the act should apply to the company in the same manner as if it had been originally incorporated under that act; and it was doubted whether that effectually excluded the application of Table (B.), subject to the deed or charter, and also whether there was power to alter the deed or charter by special resolution; and to meet that doubt the section is repealed, and in lieu thereof it is provided—first, that all the provisions contained in the act of Parliament, deed of settlement, letters-patent, or other instrument of incorporation constituting or regulating the company, shall be deemed to be regulations of the company *in the same manner* as if they were contained in any registered memorandum and articles of association, and then that the company shall be treated in all respects as any other company formed under the act, except subject to certain provisoes. First, Table (B.) is not to apply to such

a company, unless adopted by special resolution; secondly, no company shall have power to alter any provision contained in any act of Parliament relating to the company at all; or, thirdly, in any letters-patent, without the consent of the Board of Trade; lastly, no company is to alter any of the provisions in the instrument which incorporates it, which, by the 5th section of the Principal Act, are required to be prescribed by the memorandum of association, and not authorised to be altered by the acts of 1856 and 1857.

CAP. XLIII. SUMMARY PROCEEDINGS BEFORE JUSTICES OF THE PEACE—APPEALS BY SPECIAL CASES.—It has hitherto been a rule, that no appeal lies from a magistrate's decision unless it is expressly given by statute. The consequence has been that in very many cases no right of appeal has existed, although the adjudication may have been as important in its nature and its results as in other instances from which the party dissatisfied had the power of appealing to the court of quarter sessions. This anomaly was not remedied by Jervis's Act (11 & 12 Vic. c. 43), although it professed to consolidate and render uniform the procedure which relates to summary convictions and orders; but the new act furnishes a remedy by allowing an appeal against any conviction or order of magistrates to one of the superior courts of common law, upon the ground that it is erroneous in point of law. The magistrates, it is true, may refuse to allow the appeal (except where the application is made under the Attorney-General's direction), if they are of opinion that the application is merely frivolous; but even then the appellant may apply to the Court of Queen's Bench for a rule calling upon them to show cause why the appeal should not lie. The form of the appeal is to be by special case, which is to be stated and signed by the justices, provided the application for that purpose is made to them in writing, and security to prosecute, &c., given within three days of their decision. The appellant on receiving the case is to give a copy thereof, and notice of appeal, to the respondent, and is to transmit the case itself (without certiorari) to the superior court within three days after he, the appellant, has received it. The superior court, or a judge at chambers, is to decide the case, having power over the costs, and their decision is to be enforced by the magistrates. The act is already in force, but the courts are empowered to make rules for regulating procedure under it. It will be observed that the statute does not provide for appeals on matters of fact: these, therefore, remain almost as before, and will lie only where expressly allowed by statute, and then to quarter sessions. The only alteration made as to such appeals is, that they will be taken to have

been abandoned when an appeal on a point of law is made under this statute.

As this is a very important act, we will state its provisions somewhat more in detail. The first section interprets the meaning of the words "Superior Courts of Law and Court of Queen's Bench." The second section enacts, that after the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way by any law now in force or hereafter to be made, either party to the proceeding before the said justice or justices may, if dissatisfied with the determination as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of one of the Superior Courts of Law, to be named by the party applying; and such party, hereinafter called "the appellant," shall, within three days after receiving such case, transmit the same to the court named in his application, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given, hereinafter called "the respondent." In addition to the former remark, that the above section does not apply to matters of fact, it will be seen that it applies only to a determination upon a complaint or information in a summary way. The act states, that, in order to give a party a right to have a case stated, he must apply in writing within three days after the determination to the justice or justices to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of one of the superior courts of law, to be named by the party applying. Under this head it will be observed, that the power to require a case to be stated is given to *either party*, so that it is equally open to an informant or complainant whose information or complaint is dismissed to require a case, as to a defendant who is convicted or has an order made upon him. The three days here referred to are one inclusive and the other exclusive; thus, if the determination be pronounced on the first of the month, the last day for giving the notice will be the fourth. The notice should be served upon each of the justices whose determination it purports to be, by delivering it personally or by leaving it at their places of residence; and as an additional caution it will be well to deliver a copy also to their clerk.

Security and notice to be given by the appellant.—By sec. 3, "the appellant, at the time of making such application, and before a case shall be stated and delivered to him by the justice or justices, shall in every instance enter into a recognisance before such

justice or justices, or any one or more of them, or any other justice exercising the same jurisdiction, with or without surety or sureties, and in such sum as to the said justice or justices shall seem meet, conditioned to prosecute without delay such appeal, and to submit to the judgment of the superior court, and pay such costs as may be awarded by the same; and the appellant shall, at the same time, and before he shall be entitled to have the case delivered to him, pay to the clerk to the said justice or justices his fees for and in respect of the case and recognisances, and any other fees to which such clerk shall be entitled, which fees, except such as are already provided for by law, shall be according to the schedule to this act annexed marked (A.), until the same shall be ascertained, appointed and regulated in the manner prescribed by the statute 11 & 12 Vic. c. 48, s. 30; and the appellant, if then in custody, shall be liberated upon the recognisance being further conditioned for his appearance before the same justice or justices, or if that be impracticable before some other justice or justices exercising the same jurisdiction who shall be then sitting, within ten days after the judgment of the superior court shall have been given, to abide such judgment, unless the determination appealed against be reversed."

Refusal of frivolous case.—By sec. 4, if the justice or justices shall be of opinion that the application is merely frivolous, but not otherwise, he or they may refuse to state a case, and shall, on request of the appellant, sign and deliver to him a certificate of such refusal, provided that they are not to refuse where the application is made to them by or under the direction of the Attorney-General.

Refusal of case by justices—Queen's Bench ordering case.—The 5th sec. empowers the Court of Queen's Bench, when the justices refuse to state a case, to grant a rule (upon the application upon affidavit of the appellant) calling upon them and the respondent to show cause why such case should not be stated; and upon the rule being made absolute they are to state it accordingly.

Determination of questions.—Sec. 6 confers power upon the superior courts to deal with the case when brought up; and it enacts that "the court to which a case is transmitted under this act shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm or amend the determination in respect of which the case has been stated, or remit the matter to the justice or justices with the opinion of the court thereon, or may make such other order in relation to the matter, and may make such order as to costs as to the court may seem fit; and all such orders shall be final and conclusive on all parties. Provided always, that no

justice or justices of the peace who shall state and deliver a case in pursuance of this act shall be liable to any costs in respect or by reason of such appeal against his or their determination."

Amendment of case.—By sec. 7, the case may be sent back for amendment.

Judge at chambers exercising powers.—By sec. 8, the powers of the superior court may be exercised by a judge at chambers.

Enforcing conviction.—By sec. 9, after the decision of the superior court, the justices may issue warrants to enforce the conviction or order which has been affirmed or amended by the superior court.

Certiorari.—The 10th section dispenses with the necessity of obtaining a writ of *certiorari* in order to remove into the court above the case stated by the justices. This is a great improvement upon the practice which now obtains with reference to cases stated at the quarter sessions, with respect to which all the cumbrous machinery of a *certiorari* is brought into action.

Enforcing recognisances.—When a party entering into a recognisance has failed to comply with its conditions, by sec. 13, the justice is to certify in what respect the failure has been, and then to transmit the same to the Clerk of the Peace, &c., to be proceeded on in the same manner as forfeited recognisances at quarter sessions.

Appellants not to appeal to quarter sessions, &c.—The 14th section enacts that any person who shall appeal under the provisions of this act against any determination of a justice or justices shall be taken to have abandoned any right which he otherwise may have had of appealing to the court of quarter sessions.

DEBATING SOCIETIES.

BIRMINGHAM LAW STUDENTS' DEBATING SOCIETY.

Sept. 16, 1857.—*Moot Point, No. 231.*

Would evidence of an usage of trade be admissible to render an agent liable as principal where he had by writing expressly contracted as agent?

A point raising the question as to the admissibility of parol evidence of custom and usage, for the purpose of annexing incidents to or explaining the terms of a written contract, being considered a matter of commercial interest and importance, and as an item of commercial law, was accordingly reserved for discussion. It need scarcely be stated, that parol evidence is admissible to explain the meaning of any term used in a contract, and in reference to which known usages or customs have been established and prevailed; and, in the next place, that parol evidence is not admissible to add to or vary the terms of a written contract, but that such evidence is only

receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable.

With respect to commercial contracts, it has been long established that evidence of an usage of trade applicable to the contract, and which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the written instrument is silent; however, evidence of usage, though sometimes admissible to add to or explain, is never so to vary or to contradict, either expressly or by implication, the terms of a written instrument (see *Vallego v. Wheeler*, Loft. 631; *Eden v. East India Company*, 1 Wm. Black. 299; 2 Burr. 1216; *Magee v. Atkinson*, 2 M. and W. 442; *Adams v. Wordley*, 1 M. and W. 374; *Trueman v. Loder*, 11 A. and E. 589). Therefore, as to the liability of an agent where the name of his principal is disclosed by the contract, it is difficult to contend, on the authority of the cases, that he would be liable, inasmuch as the contract in our case is with the principal; and to force the agent into a liability on the score of an usage or custom is to violate the very terms of the instrument, and to incorporate a condition totally inconsistent therewith. The current of authority appears to favour the negative view of the question; but a distinction prevails where the agent names his principal, and where not. The chief authorities on the moot point are *Browne v. Byrne*, 23 L. J. R., Q. B., 313; *Humfrey v. Dale*, 26 L. J. R., Q. B., 137; *Green v. Kopke*, 25 L. J. R., C. P., 297; *Gillett v. Offer*, 18 C. B. 905; *Godts v. Rose*, 25 L. J. R., C. P., 61; *Phillips v. Briard*, 25 L. J. R., Ex., 288; and notes to *Wigglesworth v. Dallison*, 1 S. L. C. 4th edit.

The meeting decided in the negative, but upon the ground that the name of the principal is disclosed by the contract.

A. FEREDAY, Corresponding Secretary.

MOOT POINTS.

No. 13.—*Petty Sessions.*

Are clerks to justices of the peace bound to publish in the county papers the proceedings at petty sessions? If so, under what statute are they so bound. A. B.

We have never heard that clerks to justices are bound to publish the proceedings of the petty sessions, but, if they are, we shall be obliged by any of our subscribers giving us the required information.—Eds.

No. 14.—*Dissenting Minister.*

Is a dissenting minister, appointed by trustees to officiate in a Dissenting chapel, a tenant at will? That is, when no term was fixed or agreed upon, but his salary paid yearly. Does *Doe v. Jones*, 10 B. and C. 718, apply? AN ARTICLED CLERK.

PUBLIC HEALTH ACTS.

The decisions upon the series of acts called the Public Health and Nuisances Removal Acts (see vol. 2, pp. 84—86) are very numerous, and the occasions in which the acts are required to be put in force are so frequent, that the following compendious abstract of their provisions will be acceptable.

POWERS OF LOCAL BOARDS OF HEALTH, WHICH OUGHT TO BE STRINGENTLY EXERCISED AT THIS TIME.

1. *Under the Public Health Act.*

To provide that all streets within the district, including the foot pavements, are properly swept, cleansed, and watered, and the dust, ashes, rubbish, filth, dung, and soil therein collected and removed (sec. 55).

To provide that all drains and water-closets, privies, cesspools, and ash-pits, are constructed and kept so as not to be a nuisance or injurious to health, and to give authority in writing to the surveyor to enter and examine any premises with reference to the state of the drain, water-closet, privy, cesspool, or ash-pit (sec. 54).

To drain, cleanse, cover or fill up, at the owner's or occupier's expense, all pools, ponds, open ditches, sewers, drains, and places used for the collection of any drainage, filth, water, matter, or thing of an offensive nature or likely to be prejudicial to health, with power to pay the whole or part of these expenses out of the general or special district rates (sec. 58).

To order the removal, within twenty-four hours, of any nuisance arising from swine, kept so as to be a nuisance to any person (sec. 59).

To proceed against any person who suffers waste or stagnant water to remain in any part of a dwelling-house for twenty-four hours after notice, or who allows the contents of any water-closet, privy, or cesspool to overflow or soak therefrom (sec. 59).

To take proceedings against the owners or occupiers of any houses which, on the certificate of the officer of health, shall appear to be in such a filthy or unwholesome condition that the health of any person is affected or endangered thereby; and to direct the whitewashing, cleansing, or purifying thereof where this would tend to prevent or check infectious or contagious disease (sec. 60).

To prevent the business of a blood-boiler, bone-boiler, fellmonger, slaughterer of cattle, horses, or animals of any description, soapboiler or tallow-melter, tripeboiler, or other noxious or offensive trade, business, or manufacture being newly established in any building or place, without the consent of the local board, unless the General Board shall otherwise direct (sec. 64).

To prevent the occupation of cellars as dwelling-houses, unless certain conditions be attended to (sec. 67).

To provide a proper and sufficient supply of water for their district if the waterworks company established within such district are not able and willing to furnish such a supply upon terms certified to be reasonable by the General Board of Health (sec. 75).

To require that houses be supplied with water, if such supply can be furnished at a rate not exceeding twopence per week (sec. 76).

To cause all existing public cisterns, pumps, wells, &c., used for the gratuitous supply of water to the inhabitants, to be maintained and plentifully supplied with water; or to substitute and maintain other works equally convenient; or to construct any number of new cisterns, pumps, &c., for the gratuitous supply of any public baths or washhouses established otherwise than for private profit, or supported out of any poor or borough rates (sec. 78).

To recover penalties from any person fouling any water under the management or control of the local board (sec. 80).

2. *Under the Nuisances Removal Act, 1855.*

To appoint, or join with other local authorities in appointing, a sanitary inspector, a power of entering into premises being given for the following purposes:—

1. To ground proceedings.

2. To examine the same where nuisances exist, to ascertain the course of drains, and to inspect works ordered by justices to be done.

3. To remove a nuisance in case of non-compliance with order, or to inspect articles of food, &c.

Where a nuisance exists a justice shall, on complaint, require the person causing it, or, if he cannot be discovered, the owner or occupier of the premises where the nuisance is to abate it, and in case of non-compliance such person is liable to certain penalties. Where the person causing the nuisance, and the owner or occupier of the premises are unknown, the order of the magistrate may be addressed to and executed by the local authority.

Any nuisance removed may be sold after five days' notice, but where that delay would be prejudicial to health justices may direct an immediate removal and sale.

To provide that when any ditch, gutter, drain, or watercourse is a nuisance, and cannot be rendered innocuous without a sewer or other structure along the same or instead of it, such sewer, &c., be laid down, and to keep it in repair; and assess parties using the ditch, gutter, drain, or watercourse as a means of sewerage to the expense thereof, such pay-

ment to be either immediate, annual, or extending over a term of years.

To enforce the penalties where any person or company may foul water with gas washings—the penalty thereof being £200, and (in addition) a daily penalty of £20 imposed by sec. 25.

To provide that all meat, vegetables, flour, &c., exposed for sale, or on their way to, or in the course of being prepared for sale, or landed from any vessel in any port in England, be duly examined by the sanitary inspector, and if in his opinion they are unfit for human food, to have them seized and taken before a justice, who shall make order thereon.

To see that complaint be made to justices of nuisances arising from noxious trades or manufactures, and of any house so overcrowded as to be injurious to health, the persons causing the same being, on conviction, liable to penalties.

3. *Under the acts for the well-ordering of common lodging-houses* (14 & 15 Vic. c. 28, and 16 & 17 Vic. c. 41).

To give all keepers of common lodging-houses notice of the act, calling upon them to register their houses; the local authorities are to keep this register, entering therein the particulars required by the act. From time to time, and as circumstances require, to make regulations for fixing the number of lodgers who may be received in such registered houses, for promoting cleanliness and ventilation therein, and with respect to the inspection thereof—such regulations to be confirmed by one of the Secretaries of State, and to enforce these regulations by the imposition of penalties. To see, by their officers, who have free access to these houses at all times, that the provisions of the act, as regards cleanliness, lime-washing, &c., are duly carried out.

To see that no house is used as a common lodging-house until the same has been inspected and approved as fit for the intended purpose, and registered, and to refuse registration unless the person applying can produce a certificate of good character.

Should fever, or any infectious or contagious disease, break out in a lodging-house, to provide for the removal of the patient to an infirmary or hospital, the authorities thereof consenting. To take care that the clothes and bedding are disinfected or destroyed, and compensation to the owner for any loss or injury made out of the poor-rate.

On receiving a certificate of the existence of nuisances under the Nuisances Removal Act, to order (when necessary) the causes of complaint certified to be removed.

To take care that no lodging-house is kept by any person disqualified by three convictions under the act.

MOOT POINTS.

No. 15.—*Ringing, &c., Church Bells.*

In the parish of B., two churchwardens are appointed annually, one on the part of the parish, and the other on the part of the minister. The churchwardens consent to the ringing of the church bells, but the minister objects, and leaves instructions with the clerk of the parish not to give up the keys of the belfry without his instructions. Who is legally entitled to the possession of the keys? and who has the direction of the bells? and who is the party to decide on what occasions the bells shall be rung?

The mooter is of opinion that the churchwardens, the persons in whom the goods and chattels of the church are vested, are the persons legally entitled to exercise all these rights; and that, even if the churchwardens should use their discretion in an improper manner, the minister has no right to interfere, for in this case he is represented by his own officer, the churchwarden appointed on his behalf. An opinion will oblige. W. M. S.

No. 16.—*Landlord and Tenant—Stamp on Letting.*

I should be glad if you would inform me what is the proper stamp on an instrument whereby a landlord "agrees to let," and a tenant "agrees to take," a house from year to year, there being no more formal agreement intended to be drawn out. I have looked over the Stamp Acts (Woodfall's Landlord and Tenant)—where a form of agreement is given, but the stamp not stated—and Tilley's Stamp Acts, but cannot find whether it should be stamped as a lease for a term not exceeding 35 years, or as a lease not otherwise charged—i. e., with a £1 15s. stamp. I believe the question was mooted a few years ago, either in the Law Students' Magazine or Law Chronicle, but cannot find the place. B. B.

No. 17.—*Mortgage—Sale—Application of Money.*

A. mortgages premises in fee to B. for £300; A. dies, leaving part of the premises to C. and part to D.; C. further mortgages his part of the premises to B. (the same mortgagee) for £300 more; B., the mortgagee, under his power of sale, sells C.'s part of the premises for £300. *Quære*: Must not the purchase money be applied in payment of the first mortgage, and in exoneration of the whole premises therefrom? And if so, has B. any further claim on D.'s part of the premises? J. L.

GENTLEMEN,—Allow me to call the kind attention of some of your numerous correspondents on moot points, to the following—viz., Moot Points, Nos. 149, 153, 154, 155, 156, 166, and 167 (vol. 3)—which as yet, I believe, remain unanswered. ALIQUIS.

COURSES OF LAW STUDIES.

(Continued from p. 136).

Of the reasoning theory or common sense of pleading.

—Although the modern notions of the necessity and excellency of *pleading* differ much from those formerly entertained, yet until our law reformers shall totally abolish pleadings, the following statements concerning the "Common Sense of Pleading" may be useful, though necessarily very brief.

The multiplicity of disputes and controversies which are every day submitted to judicial determination, has evinced the necessity of prescribing a regular method of proceeding in order to prepare them for legal examination; this is, in few words, the history of what is called "special pleading," and which, in fact, is only another name for that sort of logical discussion of the subject of complaint or controversy, which enables the court and the jury to discover, at one view, the number and nature of the precise points in dispute, upon which the parties are at issue. That we have usually indeed so much seeming obscurity to contend with, at least upon our commencement of this course of study, is a natural consequence, not of the want of evidence in things, but of the defect of preparation in ourselves, and more particularly of our not being conversant in the meaning of *the terms of art*, which experience has shown to be necessary to be resorted to, in this branch of learning, for the sake of certainty, brevity, and convenient precision. In this, however, it is to be observed, that the law, with regard to its technical phrases, stands upon the same footing with other studies, and requires only the same indulgence. The science of special pleading is not more difficult to be explained by a teacher than the science of rhetoric itself. Having succeeded in distinctly and fairly understanding *the terms of art*, we are enabled to perceive, in a short time, and with very little labour, that the various doctrines and rules of pleading are of a nature to be demonstrated upon the principles, upon which they were originally suggested, of plain reason and common intendment; and that they have usually no further authority in practice than in proportion as they are calculated to promote the ends of substantial justice, whether by guarding against surprise, by preventing confusion, by saving time to the court and jury, or by defeating the subterfuges of the dishonest disputant, and compelling him to come to an issue upon the precise points in question between the parties.

Special pleas—Covenant, infancy.—For example. In order to guard against surprise, it is a rule in pleading (in all personal actions) that all such matters as must necessarily preclude the plaintiff from his action, without, at the same time, amount-

ing to a total traverse or denial of the declaration, shall be pleaded specially. Thus, if A. brings an action of covenant against B. he comes prepared to give evidence of the covenant, and not to disprove the nonage of the defendant or other special matter which might possibly be alleged against him; and, therefore, in *such case*, it is but strictly reasonable and consistent with common justice that the defendant should be obliged to plead *the special matter* in order to apprise the plaintiff of the particular nature of the defence. [In every species of action on contract, nonage is to be specially pleaded. Plead. Rules, T. T. 1853, pl. 8.]

Replication and rejoinder—Departure from previous pleading—Plea of performance—Offer.—Again, in order to prevent confusion, the law will not allow the plaintiff, in his replication, to vary from his original declaration, nor the defendant, in his rejoinder, to depart from his plea (see Bacon's Abr. tit. "Plea and Pleading" L.). Thus, if the defendant (in an action of covenant) pleads performance of the covenants, and the plaintiff replies "that he did not perform some particular act according to his covenant," and the defendant rejoins "that he offered to do it," this is a departure, and, therefore, bad in pleading: for it is one thing to *do*, and another to *offer to do it*; and if this sort of pleading were to be allowed, the altercations might be carried on to an endless length, and the court be left in the dark at last, and uncertain for which of the parties to give judgment.

Pleading a surplusage—Traversing it.—Having shown the common sense of these general rules, let us now take the technical maxim "that the plaintiff (in an action of debt) must traverse the surplusage, if any, and not the tantum;" which I shall endeavour to demonstrate to be no more than a maxim of plain reason, grounded upon the propriety of defeating the subterfuges of a dishonest disputant, and compelling him to come to an issue upon the precise point in question between the parties. Suppose, for instance, A. brings an action of debt against B. for £20, and B. pleads thereto, *that the debt was £30 and not £20 only, as the plaintiff has thereof alleged against him*; this is what, in the language of the law, is called pleading a *surplusage*. But in an action of debt, which is grounded on an express deed of contract between the parties, if the proof varies from the declaration, it is evidently no longer the same contract whereof the performance is sued for. A man can no more bring an action for £20 and recover £30 than he who brings an action for a horse can recover an ox. Suppose, then, the plaintiff persists in his original demand of the £20 *only*, he must necessarily lose the benefit of his action by the operation of the supposed surplusage. But if he *traverses the surplusage* (as by adding words to the

following effect "*without this, that the debt was of the other £10 surplusage,*") he then reduces the debt to the exact sum which constitutes the original demand, or cause of action, and of which no further proof is necessary; for the defendant has already admitted and confessed it "inclusively" in the greater sum; for *omne majus continet in se minus* (Noy's Max. 25).

Surplusage—Debt for rent—Eviction as to surplusage.—Again, to bring another example in illustration of the same rule, suppose the plaintiff, in debt for rent, declares on a demise of twenty acres rendering rent, and the defendant pleads thereto "that the demise was of twenty-six acres, and not of twenty acres only, and that the plaintiff entered and suspended him from the other six acres, and that, therefore, he ought not to have and maintain his action thereof against him." Now, the question in this case is not of the demise, in the declaration, of the twenty acres, for that is *admitted and confessed* by the defendant "inclusively" in the twenty-six acres, but whether or not the demise was of the other six acres which constitute the *surplusage*. For if these are no part of the demise in question, the alleged interruption has nothing to do with it; and, consequently, which ever way that is found, the cause must evidently be determined.

Blackstone's Commentaries (ante, p. 78).—It is often of much more real disservice to an author to ascribe to him a degree of merit to which he has no pretensions than it is to take from him the merit which he really has: he is consequently exposed by it to the odium of disapproving criticism; his mistakes become matter of importance, his inaccuracies no longer venial, and a degree of responsibility is forced upon him which is generally injurious to his reputation, in proportion as it is beyond the scope of his engagements. Perhaps there is no professional writer who has suffered more in this instance, from the zeal of injudicious admirers, than Blackstone, in his celebrated Commentaries. In the rank of elementary composition, there can hardly, indeed, be too much praise bestowed upon them, for the acknowledged neatness and apparent propriety of their arrangement, the classic purity of their language, and, above all, the elegant, though incomplete and often incorrect perspective they exhibit of the infinitely disjointed and shapeless materials of professional learning, reduced into much seeming order and regularity. But it is not as the elementary composition that we have now to speak of them; it is as the institute for educating and forming lawyers. And here, I trust, it will be understood, that whatever license I may permit myself, in the course of the following observations, it will be always without the smallest idea of breaking in upon the respect which is due to the memory of the learned judge, or of

detracting, in the slightest degree, from the well-earned general reputation of his truly classical commentaries. It is only their particular merit, with reference to the misapplication which has been since made of them, that I conceive to be questionable. The error was in adopting them as an institute for the instruction and education of professional students, which was evidently no part of Blackstone's plan, nor within the scope of his engagements. *Non hæc in fœdera venit.* It was not the lecturer at one of our inns of court, but the university professor, who instructed from the Vine-rian chair, and who accordingly addresses himself not to professional but to unprofessional readers. He considers as a popular writer, not what "the few" require to be informed of, but "the many;" and hence too, as a popular writer, and indeed as he himself tells us, he takes care to illustrate those detached parts of the law alone which are found to be most capable of historical or critical ornament (1 Bl. Com. Introd. p. 34). From what is to be collected from the author's own words, it appears that his commentaries were written in order to be delivered in a course of academical lectures, not to the students of the inns of court, but to those of the University of Oxford; and not to instruct and form lawyers, but to render the law intelligible to the uninformed minds of beginners, whom we are apt to suppose acquainted with terms and ideas they have never had an opportunity to learn; and, more particularly, to give a general idea of the law to those gentlemen who might be afterwards called upon to act as magistrates or members of Parliament. Addressing himself to persons of this description, like some experienced actor who accommodates himself to the temper and character of his audience, he represents everything rather for effect than with a view to demonstrate. Like the gnomon upon the sun-dial, he takes no account of any hours but the serene;—

— Et quæ

Desperat tractata nitescere posse, relinquit.

In a professional point of view, this solicitude, rather to captivate the imagination of the student than to exercise and discipline his understanding, is equally unprofitable and inconvenient. It puts him off with ornamental illustration instead of solid argument, and leads to a sort of half information, which is often much worse than no information at all upon the subject. A man may read Blackstone's Commentaries, from the one end to the other, and yet have no notion that a proposition in law is as capable of being resolved and demonstrated as a proposition in the mathematics; the theorem, that "by the extinction of the fee of a seignior, a particular estate for life in that seignior is also extinguished,"

as the theorem, that "the square of the subtending side is equal to the two squares of the containing sides of a right-angled triangle."

Theorem, that by the extinction of the fee of a seignior, a particular estate for life in that seignior is also extinguished (Co. Litt. 280 a.).—Suppose A. and B. lord and tenant in fee simple. A. leases his seignior for 21 years, to C., and afterwards A. releases to B. and C. generally. If C. accepts the release, his estate in the whole seignior is immediately extinguished for ever; for the first operation of the release was to make B. and C. joint-tenants of the seignior for life, with remainder to B. in fee; because a release of the seignior to the tenant of the land can only operate by way of extinguishment; for otherwise the tenant would be paying services to himself, *quod esset absurdum*. Also, such release being made "generally," is good to extinguish the fee, without the word heirs being inserted, because a release is always to be taken most strongly against the releasor, who ought to have explained himself, and, likewise, because such releases were always favoured at the common law, on account of their tendency to unite the fee, the feudal services being more easily collected from one tenant than from many. It may be observed that it is a rule of law, that, in all doubtful cases, the exposition of the words of a contract shall be taken most strongly against him, who ought to have explained himself. For example: if two tenants in common grant a rent of £1, this is to be understood to be several, and the grantee shall have £2. And so on the other hand, if they make a lease, and reserve to themselves £1, they shall have only £1 between them, upon the same principle (Co. Litt. 197 a. 267 b.). But to return to our point: With respect to C. the release operates *per elargir son estate*, not to a fee for want of the word heirs (for a release *per elargir le estate* is in the nature of a grant, and, consequently, the word heirs is necessary in order to pass the inheritance), but to the greatest possible estate not of inheritance, and this is an estate for the life of C. And C. being thus seised, as joint tenant of the whole seignior, "*per tout* as well as *per my*," his lease for years in the whole seignior is, consequently, merged; that is to say, the term for years, which is but a chattel interest, is drowned or extinguished in the freehold. Secondly, B. and C., being thus joint tenants for life of the whole seignior, remainder to B. in fee, and B. being also tenant of the land, it follows, that all the estate which B. could have by the release—namely, the moiety of the freehold, and the remainder in fee in the whole seignior—is now become extinct, and, consequently, the jointure severed; and, therefore, C. remains tenant for life of a moiety, the fee of that moiety

being extinct. But it is a maxim of law, that when the fee of a seignior is extinct, there can no longer exist a particular estate for life in that seignior; because every particular estate implies a tenure or attendance over, which is here expressly negatived (Co. Litt. 812 b.; *ibid.* 152 b.). Also, it is another maxim, that since every particular estate is only a portion (*particula*) of a fee simple, when the corresponding portion does not exist in deed, it is always supposed to exist, or, in other words, is created for conformity sake, in fiction or contemplation of law. But, in the present case, there can be no such fiction, because there is an actual release, which necessarily operates to extinguish the fee; and, consequently, the fee being extinguished, C.'s estate for life in the seignior is also extinguished by the same act by which it was created, for the benefit of B. the tenant.

Maxim as to particular estate and remainder.—In order to illustrate the second of the above maxim, suppose, for example, A. tenant in tail, with limitation to his issue female, leases to D. for life, and dies, leaving a son and daughter. Now the estate tail having been discontinued by the lease to D. for life, the entry of the daughter is, supposing the discontinuance to have happened before the 1st of January, 1834 (see 3 & 4 Will. 4, c. 27, s. 39), taken away. For when A. made the lease to D. for life, he assumed to have the reversion or corresponding remainder in fee simple in himself. Upon A.'s death, that reversion descended to the son, who was A.'s heir at the common law, and who, if D. commits waste, may have an action of waste, which the issue in tail cannot have, because of the discontinuance. But no sooner is this fictitious reversion reduced into possession, than it instantly vanishes. The estate tail revives as before the discontinuance, and the right of entry accrues, at the same instant, to the issue in tail, according to the original limitation (Co. Litt. 838 a., 838 a.).

PARTNERSHIPS IN JOINT-STOCK COMPANIES.

Winding-up Acts—Joint-Stock Companies Act, 7 & 8 Vic. c. 110, s. 29—Powers of directors—Assignment of the business of one company to another.

In the following case Lord Wensleydale gave so clear an explanation of the doctrine of partnerships in joint-stock companies, that we think our readers will benefit by its perusal, and we, therefore, give it in *extenso*. We may premise, that, by the 29th section of the 7 & 8 Vic. c. 110, it is enacted, "that if any director of a joint-stock company registered under this act be either directly or indirectly concerned or interested in any contract proposed to be made by or on behalf of the company, whether for

land, materials, work, to be done, or for any purpose whatsoever, during the time he shall be a director, he shall, on the subject of any such contract in which he may be so concerned or interested, be precluded from voting or otherwise acting as a director; and that if any contract or dealing," and so on, except one in the course of their ordinary business, "shall be entered into, in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose; and that no such contract shall have force until approved and confirmed by the majority of votes of the shareholders present at such meeting." It appeared that the Sea Fire Life Insurance Company was started in 1849. Under its deed of settlement the directors had power to purchase the goodwill or business of any other insurance company. The Port of London Shipowners' Loan and Insurance Company had been established in 1847. Their deed contained no powers to the directors to sell the business, but provided a mode of dissolving the company. In 1849 a sale or transfer of the business of the latter company to the former was negotiated; and though no sufficient proof of execution by the Port of London Company was given, yet the transfer actually took place, and the Sea Fire Company covenanted to indemnify the Port of London Company against all claims. The Sea Fire Company received for premiums due to the Port of London Company at the time of the transfer, £1,541 4s. 5d.; and paid, in respect of debts of the same company, £11,196 16s. 11d.: Held (reversing the judgment of the Lords Justices, but on grounds not raised before them), that the sale was void by the 7 & 8 Vic. c. 110, s. 29, one at least of the directors negotiating being interested (*Henry Ernest, Off. Man. of the Sea Fire Life Insurance Society, App., Edwin Cox Nicholls, Interim Off. Man. of the Port of London Shipowners' Loan and Insurance Society, Resp.*, 3 Jur. N. S. 919). In his judgment Lord Wensleydale said: "The principles of law upon which the liability of joint-stock companies is to be decided, as far as is necessary for the decision of this case, are very clear, and perfectly settled, though not always in practice steadily kept in view. The law in ordinary partnerships, so far as relates to the powers of one partner to bind the others, is a branch of the law of principal and agent; each member of a complete partnership is liable for himself, and, as agent for the rest, binds them, upon all contracts made in the course of the ordinary scope of the partnership business. The want of due attention to this rule in applying it to future conditional partnerships and to other associations, such as that of provisional committees, has been productive of

a frightful loss of property in our own time, until ultimately corrected by the decisions of the courts below and of this House. Any restrictions upon the authority of each partner, imposed by mutual agreement amongst themselves, could not affect third persons, unless such persons had notice of them; then they could take nothing by contract which those restrictions forbade. A corporation, by common law, could only bind itself by contract under their common seal (a necessary incident by the common law to all such corporations), except in some slight matters of service. The Court of Queen's Bench have lately given effect to contracts by companies having a royal charter only; but the difference between a corporation at common law and one created by Parliament, where it has not all the powers expressly or impliedly given by the act, does not appear to have been presented to the consideration of the Court. It is obvious that the law as to ordinary partnerships would be inapplicable to a company consisting of a great number of individuals, contributing small sums to the common stock, in which case, to allow each one to bind the other by any contract which he thought fit to enter into, even within the scope of the partnership business, would soon lead to the utter ruin of the contributories. On the other hand, the Crown would not be likely to give them a charter, which would leave the corporate property as the only fund to satisfy the creditors. The Legislature then devised the plan of incorporating these companies in a manner unknown to the common law, with special powers of management and liabilities, providing at the same time that all the world should have notice who were the persons authorised to bind all the shareholders, by requiring the partnership deed to be registered, certified by the directors, and accessible to all, and, besides, including some clauses as to the managers in the act 7 & 8 Vic. c. 110, s. 7, &c. All persons, therefore, must take notice of the deed and of the provisions of the act. If they do not choose to acquaint themselves with the powers of the directors, it is their own fault; and if they give credit to any unauthorised persons, they must be contented to look to them only, and not to the company at large. The stipulations of the deed which restrict and regulate their authority oblige those who deal with the company, and the directors can make no contract so as to bind the whole body of shareholders, for whose protection the rules are made, unless they are strictly complied with. The contract binds the person making it, but no one else. Those provisions which give to the directors discretionary powers of management do not affect strangers, and the company is bound by the exercise of the discretion which they have consented to give.

Other stipulations are directory merely, and do not constitute conditions to the exercise of the powers, but they form the subject of an action against the directors for the breach of their covenants, expressed or implied, in the deed. The great body of shareholders, for whose protection these limitations of authority are provided, cannot be affected unless they are complied with. They can act and contract only through their directors, and the acts of the individual shareholders have no effect whatever on the company at large. That this is the law has been fully settled by several decisions. The first is *Ridley v. The Plymouth, Stonehouse, and Devonport Grinding and Baking Company*; and the next is *Ridley v. The Kingsbridge Flour Mill Baking Company* (2 Exch. 711; S. C. 12 Jur. 542). These cases decide that the creditors can render the company liable only on contracts made with the directors according to the deeds. These cases were followed by *Smith v. The Hull Plate-glass Company* (8 C. B. 668). On the first trial of that case the plaintiff failed; but the Court of Common Pleas granted a new trial, on the ground, as stated by Lord Truro, that the defendants might be treated as a partnership of ordinary persons, the directors being partners, with power to bind in the ordinary course; and, the deed not having been produced at the trial, there was not sufficient evidence to make the company liable in the first instance. I do not stop to inquire whether the court were right in assuming that the action was against individuals, the terms in which the defendants were described plainly intimating that they were a corporation, either at the common law or by the Joint-Stock Companies Act, and therefore incapable of being bound except by their common seal, or according to that act. On the new trial (see 11 Scott, 897) the deed was put in, and the court were then of opinion, on a special case stated, that the company was bound only by the contracts made by the directors within their authority, and that all the persons who contract with the directors must be taken to be cognisant of the extent of it; but that in the particular case the company was bound to pay for goods ordered by the manager appointed by the directors, who was authorised to conduct the manufacture, because he had an implied power to order goods for that purpose by the deed itself; and the goods ordered by the chairman, deputy chairman, and secretary were delivered on the premises, and in a special case the court would presume to have been seen and authorised by the directors. Whether that presumption was right is of no consequence for the present purpose. If there had been a special verdict, unless it had been stated that all the directors, or that a board of directors, saw and sanctioned the purchase of each

article, it would not have been sufficient to fix the company, unless the reasoning of Maule, J., is correct, that if the directors carried on the business and allowed persons to act for them on the premises in ordering and receiving goods, the company at large would be fixed, as an ordinary partnership would be under the same circumstances. No doubt this position is quite correct, if the directors are expressly or impliedly authorised by the deed, which depends upon the terms of it, to do so; but if it is beyond the powers of the directors, it is a different matter; and all persons dealing with the company ought to look at the deed and the act of Parliament, otherwise the shareholders have not the protection which it was clearly intended to give them. It is quite unnecessary to discuss this point now, because this is not a question about goods supplied, or services performed in the way of trade in the ordinary course, but a question as to a special contract to do the very unusual thing of purchasing by one company the trade of another. Such a contract clearly does not bind unless it is authorised by the deed, and made strictly according to its provisions. Therefore it was required to be made by all the directors: of the appellant company, or by a board, where three being present, the majority approve, and therefore bind the others. And when one of the persons selling is also one of the persons buying, as was the case in this instance, Mr. Collingridge being a director of the Port of London Company, and also of the Sea Fire Life Insurance Company, such director is, by sect. 29 of the 7 & 8 Vic. c. 110, precluded from voting. And besides, the contract had no force whatever until approved by the majority of votes of the shareholders present at a meeting summoned for that purpose, according to the latter part of the 29th section. Therefore, if there was no such meeting, the contract for this purchase, as well as the covenant to indemnify founded on it, was undoubtedly void. There is no trace of any such meeting being held; and if it be said, as it may perhaps justly be said, that the deed, being under the seal of the company, and signed by two directors, must *prima facie* be taken to be valid, and it would therefore lie on the appellant to show, by negative evidence, that no such general meeting had taken place, such negative evidence is supplied by the testimony of Ashford, who was accountant of the Port of London Company and the Sea Fire Life Insurance Company, and who deposes that there was no board meeting nor general meeting, nothing of the kind, and that he never heard of any, and that Mr. Collingridge, the director in both companies, did everything. This objection founded on the express provisions of the 29th section of the 7 & 8 Vic. c. 110, does not appear to have been pre-

sent to the Lords Justices, and it is, I think, quite decisive of the question. The shareholders in the appellant company are clearly not bound by the covenant in the deed of conveyance of the 11th Oct. 1849. It becomes, therefore, wholly unnecessary to consider the other objections to that deed—first, whether it is void on the ground that it is sufficiently proved, against the *prima facie* case of the due execution of the deed in form, that there was no board of directors of the appellant company duly summoned, and so no power for two directors to enter into the deed; or, secondly, whether there was sufficient proof of the non-execution by the Port of London Company of the deed; or, thirdly, whether the want of a due conveyance of the goodwill of the trade, which was the consideration of the covenant, would in equity have been a good defence. All consideration of these matters is useless. Nor is it necessary to say anything of the effect of the Sea Fire Life Company taking the business and accounts of the Port of London Company, and receiving the premiums due to them. Whether the Port of London Company have any right to recover back the sums received against the Sea Fire Life Company is another question. It is clear that this receipt does not make them liable on the covenant to indemnify, and it is more than questionable whether the company is liable for the receipts; for the mass of shareholders have this protection—that they can be liable only through the act of their directors, acting under the authority of the deed and the act of Parliament. It is a captivating argument for a jury, and they are very often misled by it in these cases of joint-stock companies, and likely to produce injustice, that the company have had the benefit of the plaintiff's goods or service or money; whereas, for the purposes of contract, the company exists only in the directors and officers, acting by and according to the deed; and by the statute law the company is no more liable than a corporation by charter for the act of one or more of its members, who are distinct persons by law. Therefore I concur entirely with my noble and learned friend on the woolsack, that the judgment of the Lords Justices ought to be reversed."

THE STATUTE LAW.

Mode of preparing, bringing in, and passing bills.—In a very useful little work, entitled "Minutes of Proceedings in Parliament respecting Public Bills, &c.," by Mr. James Bigg, we find the following statement respecting the preparing, the bringing in, and passing of bills in Parliament, which, bringing

practical knowledge to bear on the subject, will be found useful:—

System of current legislation described—Motion for leave to bring in the bill.—The present "System of Current Legislation" admits of a brief description, and is as follows: When a member of the House of Commons desires to introduce a bill, he places a notice upon the votes, stating the title of the proposed measure, and the day when the motion for leave to introduce it will be made, and on the day named he moves "that leave be given to bring in the bill." In most cases this motion is unopposed, and is agreed to without discussion; but sometimes the motion is negatived, and, therefore, when opposition is anticipated, the mover explains the object of the proposed bill, and assigns reasons for its introduction. If the motion for leave be agreed to, the bill is ordered to be prepared and brought in by the members who moved and seconded the motion, either alone, or with the addition of other members then named. The motion for leave (whether opposed or unopposed), if agreed to, amounts merely to permission to introduce the bill, and is not held to pledge the House to any approval of the measure.

Presentation and first reading of bill.—The members obtaining leave to bring in a bill are allowed to prepare it at their leisure, and, without notice, may at any sitting present it to the House. Usually the bill has been previously prepared, and is presented on the same day that the motion for leave was agreed to; but sometimes a considerable interval elapses between the time that leave is given, and the period when the bill is presented, and occasionally members who have obtained leave to bring in bills decline to proceed further therewith, in which case their proposed measures do not come in any definite form under the consideration of the House. When a bill has been presented, it is read a first time, ordered to be read a second time on a future day then named, and ordered to be printed. These proceedings are merely formal, and do not pledge the House to any approval of the measure, but from this stage notices of all subsequent proceedings are duly inserted in the votes.

Second reading of bill.—On the day appointed for the second reading, a motion is proposed "that the bill be 'now' read a second time;" and if this motion be carried, the House is deemed to have affirmed the principle of the bill. It is therefore at this stage that discussion principally takes place, and in the case of an opposed bill, that those who dissent thereto endeavour to arrest its further progress, by moving that the bill be read a second time "this day six months," or some other term beyond the probable duration of the session; and if this amendment be carried, the bill is dismissed

from any further consideration during the session. Should the original motion be carried, the bill is then read a second time (the title of the bill alone is read, and not the bill itself), and committed for a future day then named.

Committee on bill.—The committee on a bill is the stage at which the clauses of the bill are considered seriatim. Members intending to move amendments in committee usually give previous notice thereof, and copies of such amendments are printed with the votes. In committee the chairman reads the number and marginal note of each clause, and if no amendment be proposed, the question is put "that the clause stand part of the bill;" and where amendments are proposed, the question is first put whether the alteration be made, and, if carried, then the question is put "that the clause, as amended, stand part of bill;" but few bills pass through committee without alteration, and in many cases the amendments materially alter the character of the bill. At this stage a majority can stop the further progress of a bill, either by postponing the committee to a period beyond the probable duration of the session, or by a resolution "that the chairman do leave the chair."

Report of bill.—At the close of the proceedings of the committee, the bill is reported to the House, and if no amendments have been made therein, the bill is ordered to be read a third time on a future day then named; but if the bill has been amended in committee, the amended bill is ordered to be taken into consideration on a future day then named; and if the amendments are numerous or important, the bill is ordered to be printed as amended in committee.

Consideration of bill as amended.—On the consideration of the bill as amended in committee, such amendments may be disagreed to by the House, and other amendments may be made and new clauses added; or if numerous amendments are proposed, the bill may be recommitted. At this stage it is also competent for a majority to stop the further progress of a bill, by postponing its consideration to a future period; but it is more usual to defer the opposition until the third reading, the day for which stage is named at the close of the proceedings on the consideration of the amended bill, and at which time it is not unusual for the bill, as further amended, to be again ordered to be printed.

Third reading of bill.—On the third reading the bill stands for the judgment of the House, as amended during its previous stages; and as only verbal amendments can be made at this stage, the main question is, whether the bill as a whole meets with the approval of a majority of the House; if so, it is read a third time and passed, and sent to the Lords.

Consideration of Lords' amendments.—When the bill has passed its several stages in the House of Lords, and amendments have been made therein, the bill is returned to the Commons. If the amendments are important, they are ordered to be printed, and to be considered on a future day then named, and at the time appointed they are considered, and agreed to (either with or without alteration), or disagreed to, and the bill is again returned to the Lords. At this stage it is also competent for a majority to defeat the bill by postponing the consideration of the amendments to a period beyond the probable duration of the session, but such a proceeding is rarely proposed.

Proceedings on bills in the Lords nearly identical with those in the Commons.—The proceedings on bills in the Lords are so nearly similar with those in the Commons (the most important variation being that a peer may, without previous leave, present a bill), that the preceding brief sketch of the proceedings in the Commons, which is only intended as a skeleton of the present system of current legislation, may be considered as equally applicable to the proceedings in the Lords. If this system be considered (apart from its administration), the progress of a bill may be traced from stage to stage without any such defects being observed in "the System of Current Legislation" as necessarily lead to confused and unsatisfactory results; and even when this system is considered in connection with its administration, although "the defects" then become apparent, those defects evidently arise more from the incapacity of the persons who administer the system, than from any imperfections in the system itself.

Administration of the system of current legislation.—*Preparation of bills.*—By the present system of current legislation, it is assumed that bills are prepared by the members by whom they are presented; but it is so well known that bills are now (with very few exceptions) prepared by professional draftsmen, that members presenting bills are not practically considered responsible for the manner in which they are prepared; and as the employment of professional draftsmen is not recognised by Parliament, the result is, that while "the members," who by "the system" are assumed to be responsible, are practically released from that responsibility, the professional draftsmen, who actually perform the work, and on whom the responsibility ought to rest, are unrecognised by the system, and thereby are released from being made accountable to Parliament for any errors or defects in the performance of their duties.

Defects in preparation of bills.—The employment of professional draftsmen (although unrecognised officially by Parliament) would not, in itself, be of

any consequence, if the bills were properly drawn, but unfortunately this is not the case. The fact that bills are improperly and carelessly drawn is admitted by the members of the Legislature, who have spoken on the subject; their remarks, however, seem to imply that these imperfections occur only in bills introduced by private members; this, however, is not correct. "Government bills" more frequently prove to be defective than is the case with other bills. The acts passed in 1856, relating to "Bankruptcy (Scotland)," "County Courts," and "Joint-Stock Companies," were all Government measures, and yet contained so many errors and omissions, that amendment acts have been necessary; while not a single measure passed by private members in 1856, has required an Amendment Act in 1857.

Way to remedy defects in preparation of bills.—"The way" to remedy this defect is easy if there exists "the will" to adopt it. Let the employment of professional draftsmen be recognised by Parliament, and, while the members presenting a bill remain responsible for its principle, let the draftsman who has prepared it be held responsible for its details; and in the case of every bill the draftsman should be required to annex a report, under his signature, stating the object of the bill; the alterations in the existing law proposed to be made; the acts intended to be amended or repealed; and the locality to which it is intended to apply. The name of the draftsman being annexed to a bill would alone be an important step towards insuring its more careful and skilful preparation, as the professional reputation of the draftsman would depend upon whether his bill was drawn with ability or otherwise.

Presentation of bills.—The present "system" of current legislation assumes that bills will be presented in sufficient time to allow of their careful consideration; but practically this intention is defeated either by the presentation of bills being delayed until a late period of the session, or by the proceedings thereon being deferred from time to time. Upon this point the Editor of this volume can speak from painful experience, as while during the early part of the session the perusal and abstracting of bills did not even fully occupy his leisure time, during the last few weeks of the session this labour required his whole time; and, although constantly engaged till a late hour of the night, he found it quite impossible to keep pace with the proceedings of Parliament. The Legislature cannot carefully consider measures which are delayed till near the termination of the session, if (as was the case this year) more bills are then delivered daily than can be perused by members.

RECENT STATUTES (19 & 20 VIC.).

CAP. LIV. FRAUDS BY TRUSTEES, BANKERS, ATTORNEYS, &c.—It is impossible to over-estimate the importance of this act, which is one certain to be in frequent requisition. The act has for its object the punishment of fraudulent trustees, bankers, attorneys, agents, and directors and managers of companies. Trustees fraudulently disposing of or destroying the trust property *causa lucri* are guilty of a misdemeanor (s. 1). So bankers, merchants, brokers, attorneys, agents, or persons acting powers of attorney, fraudulently selling, pledging, &c., property intrusted to them for safe custody, are guilty of a misdemeanor (ss. 2, 3). By sec. 4, bailees fraudulently converting the bailed property to their own use are guilty of larceny. Secs. 5—8 apply to directors and officers, &c., of public companies who are guilty of a misdemeanor, in fraudulently appropriating the company's property, or in keeping fraudulent accounts, or wilfully destroying books, &c., or publishing fraudulent statements with intent to deceive any shareholder, &c., or to induce any person to become a shareholder, &c. By sec. 9, persons receiving property fraudulently disposed of, knowing the same to have been so, are guilty of a misdemeanor.

As the statute is one of so much importance, we give the enactments in full. It is entitled "An act to make better provision for the punishment of frauds committed by trustees, bankers, and other persons intrusted with property," and came into operation on 17th of August last. It recites that "it is expedient to make better provision for the punishment of frauds committed by trustees, bankers, and other persons intrusted with property."

Sec. 1. Trustees fraudulently disposing of property guilty of a misdemeanor.—If any person being a trustee of any property for the benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same or any part thereof to or for his own use or purposes, or shall, with intent aforesaid, otherwise dispose of or destroy such property or any part thereof, he shall be guilty of a misdemeanor.

Sec. 2. Bankers, &c., fraudulently selling, &c., property intrusted to their care, guilty of misdemeanor.—If any person being a banker, merchant, broker, attorney, or agent, and being intrusted for safe custody with the property of any other person, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate to or for his own use such property or any part thereof, he shall be guilty of a misdemeanor.

Sec. 3. Persons under powers of attorney fraudu-

lently selling property guilty of misdemeanor.—If any person intrusted with any power of attorney for the sale or transfer of any property shall fraudulently sell or transfer or otherwise convert such property or any part thereof to his own use or benefit, he shall be guilty of a misdemeanor.

Sec. 4. Bailees fraudulently converting property to their own use guilty of larceny.—If any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny.

Sec. 5. Directors, &c., of any body corporate or public company fraudulently appropriating property.—If any person, being a director, member, or public officer of any body corporate or public company, shall fraudulently take or apply, for his own use, any of the money or other property of such body corporate or public company, he shall be guilty of a misdemeanor.

Sec. 6. Or keeping fraudulent accounts.—If any person, being a director, public officer, or manager of any body corporate or public company, shall as such receive or possess himself of any of the money or other property of such body corporate or public company otherwise than in payment of a just debt or demand, and shall, with intent to defraud, omit to make or to cause or direct to be made a full and true entry thereof in the books and accounts of such body corporate or public company, he shall be guilty of a misdemeanor.

Sec. 7. Or wilfully destroying books, &c.—If any director, manager, public officer, or member of any body corporate or public company shall, with intent to defraud, destroy, alter, mutilate, or falsify any of the books, papers, writings, or securities belonging to the body corporate or public company of which he is a director or manager, public officer or member, or make or concur in the making of any false entry, or any material omission in any book of account or other document, he shall be guilty of a misdemeanor.

Sec. 8. Or publishing fraudulent statements guilty of misdemeanor.—If any director, manager, or public officer of any body corporate or public company shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any money or property to such body corporate or public

company, or to enter into any security for the benefit thereof, he shall be guilty of a misdemeanor.

Sec. 9. Persons receiving property fraudulently disposed of, knowing the same to have been so, guilty of misdemeanor.—If any person shall receive any chattel, money, or valuable security which shall have been so fraudulently disposed of as to render the party disposing thereof guilty of a misdemeanor under any of the provisions of this act, knowing the same to have been so fraudulently disposed of, he shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the party guilty of the principal misdemeanor shall or shall not have been previously convicted, or shall or shall not be amenable to justice.

Sec. 10. Punishment for a misdemeanor under this act.—Every person found guilty of a misdemeanor under this act shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to suffer such other punishment, by imprisonment for not more than two years, with or without hard labour, or by fine, as the court shall award.

Sec. 11. No person exempt from answering questions in any court; evidence not admissible in prosecutions under this act.—Nothing in this act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court of law or equity, or in the courts of bankruptcy or insolvency; but no answer to any such bill, question, or interrogatory shall be admissible in evidence against such person in any proceeding under this act.

Sec. 12. No remedy at law or in equity shall be affected; convictions shall not be received in evidence in civil suits.—Nothing in this act contained, nor any proceeding, conviction, or judgment to be had or taken thereon against any person under this act, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any offence against this act might have had if this act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him; and nothing in this act contained shall affect or prejudice any agreement entered into or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated.

Sec. 13. No prosecution shall be commenced without the sanction of some judge or the Attorney-General.—No proceeding or prosecution for any offence included in the first section, but not included in any other section of this act, shall be commenced without the sanction of her Majesty's Attorney-General, or, in case that office be vacant, of her Majesty's Solicitor-

General: provided that where any civil proceeding shall have been taken against any person to whom the provisions of the said first section, but not of any other section of this act, may apply, no person who shall have taken such civil proceeding shall commence any prosecution under this act without the sanction of the court or judge before whom such civil proceeding shall have been had or shall be pending.

Sec. 14. *If offence amounts to larceny, person not to be acquitted of a misdemeanor.*—If upon the trial of any person under this act it shall appear that the offence proved amounts to larceny, he shall not by reason thereof be entitled to be acquitted of a misdemeanor under this act.

Sec. 15. *Costs of prosecutions.*—In every prosecution for any misdemeanor against this act, the court before which any such offence shall be prosecuted or tried may allow the expenses of the prosecution in all respects as in cases of felony.

Sec. 16. *Misdemeanors not triable at sessions.*—No misdemeanor against this act shall be prosecuted or tried at any court of general or quarter sessions of the peace.

Sec. 17. *Interpretation of certain terms.*—The word "trustee" shall in this act mean a trustee on some express trust created by some deed, will, or instrument in writing, and shall also include the heir and personal representative of any such trustee, and also all executors and administrators, liquidators under the Joint-Stock Companies Act, 1856, and all assignees in bankruptcy and insolvency. The word "property" shall include every description of real and personal property, goods, raw and other materials, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods; and such word property shall also denote and include not only such real and personal property as may have been the original subject of a trust, but also any real or personal property into which the same may have been converted or exchanged, and the proceeds thereof respectively, and anything acquired by such proceeds.

Sec. 18. *Act not to extend to Scotland.*—This act shall not extend to Scotland.

CAP. LVII. REVERSIONARY INTERESTS OF MARRIED WOMEN.—The following act is one making a great alteration in the law as to the reversionary interests of married women in personal estate—placing such interests, strange to say, in a better position, so far as the disposition thereof is concerned, than interests in possession in personal estate. But there are serious limitations of its utility, for the act is not to apply to any interest which the married

woman acquires under any instrument made prior to the 1st of January, 1858, and in no case does it enable her to dispose of any interest in personal estate settled upon her by any settlement or agreement for a settlement made on the occasion of her marriage. As the act is a very short one, and is of practical importance, we give its provisions in *extenso*.

Sec. 1. *Married women may dispose of reversionary interests in personal estate, and release powers over such estate, and also their rights to a settlement out of such estate in possession.*—After the 31st day of December, 1857, it shall be lawful for every married woman by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever to which she shall be entitled under any instrument made after the said 31st of December, 1857 (except such a settlement as after mentioned), and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any such personal estate, as fully and effectually as she could do if she were a *feme sole*, and also to release and extinguish her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession under any such instrument as aforesaid, save and except that no such disposition, release, or extinguishment shall be valid unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: provided always, that nothing herein contained shall extend to any reversionary interest to which she shall become entitled by virtue of any deed, will, or instrument by which she shall be restrained from alienating or affecting the same.

Sec. 2. *Deeds to be acknowledged by married women in the manner required by 3 & 4 Will. 4, c. 74, for disposing of interests in or powers over land in England or Wales; in Ireland, as by 4 & 5 Will. 4, c. 92.*—Every deed to be executed in England or Wales by a married woman for any of the purposes of this act shall be acknowledged by her, and be otherwise perfected, in the manner in and by the act passed in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled "An act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance," prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land; and every deed to be executed in Ireland by a married woman for any of the purposes of this act shall be acknowledged by her and be otherwise perfected in the manner in and by the act passed in the fourth and fifth years of the reign of his late

Majesty King William the Fourth, intituled "An act for the abolition of fines and recoveries, and the substitution of more simple modes of assurance in Ireland," prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land; and all and singular the clauses and provisions in the said acts concerning the disposition of lands by married women, including the provisions for dispensing with the concurrence of the husbands of married women, in the cases in the said acts mentioned, shall extend and be applicable to such interests in personal estate and to such powers as may be disposed of, released, or extinguished by virtue of this act, as fully and effectually as if such interests or powers were interests in or powers over land.

Sec. 3. *The powers of disposition given by this act not to interfere with any other powers.*—Provided, always, that the powers of disposition given to a married woman by this act shall not interfere with any power which independently of this act may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this act she may be prevented from so doing, in consequence of such power having been suspended or extinguished by such disposition.

Sec. 4. *Act not to extend to settlements of married women upon marriage.*—Provided always, that the powers of disposition hereby given to a married woman shall not enable her to dispose of any interest in personal estate settled upon her by any settlement or agreement for a settlement made on the occasion of her marriage.

Sec. 5. *Not to extend to Scotland.*—This act shall not extend to Scotland.

CAP. LXXXV. DIVORCE AND MATRIMONIAL CAUSES ACT.—This is the important statute respecting which so much discussion took place in the last session of Parliament upon several points of great interest not merely to professional men, but also to other classes of her Majesty's subjects. The act cannot come into force sooner than the 1st of January, 1858 (sec. 1), and the period of its operation, whether on that or a subsequent day, is to be fixed by an order in council made one month previously to the day appointed.

Style and judges of new court.—The act puts an end to the jurisdiction of all the existing ecclesiastical courts, as regards questions of marriage (except so far as relates to the granting of marriage licences), and erects a new court for the determination of such questions, including particularly divorce causes; and it is provided that all pending suits in causes and matters matrimonial shall be transferred to, dealt with, and decided by the new court. This

court is to be styled "The Court for Divorce and Matrimonial Causes." The judge of the Court of Probate is to be the "Judge Ordinary;" its other judges will be the Lord Chancellor and the chief and senior puisne judges of each of the three superior common law courts. The Judge Ordinary may act alone in all cases, except petitions for dissolving or annulling marriage, and applications for new trials of questions or issues before a jury, which are to be determined by three or more of the judges, and except also bills of exception, special verdicts, and special cases, which are to be determined by the full court. During the temporary absence of the Judge Ordinary, the judge of the Admiralty Court, or a common law or equity judge, may be appointed to act in his stead. The court is to sit at such place as may be appointed by Order in Council; it will be a court of record, having a seal of its own, and its decrees and orders, or copies thereof, sealed with such seal, will be receivable in evidence. The registrars and other officers of the principal registry of the Court of Probate are to attend its sittings. Advocates or proctors of any ecclesiastical court in England, and all barristers, attorneys, and solicitors entitled to practise in the superior courts at Westminster, may practise in it (secs. 6, 8, 9, 15, and 39).

Further than this, a judge of assize, at the assizes for the county in which the husband and wife reside or last resided together, may hear and determine applications for restitution of conjugal rights or for judicial separation, and, where the application is by the wife, may make an order for alimony. He may refer the application to a Queen's counsel or serjeant named in the commission.

A wife deserted by her husband has also a more summary remedy. She may apply in London to a police-magistrate, or in the country to justices in petty sessions, for protection; and after she has proved the fact of desertion without reasonable cause, and also that she is maintaining herself by her own industry or property, she may obtain an order by which her earnings and property acquired since the desertion began will be protected from her husband, and all creditors and other persons claiming under him. If the husband, or any person claiming under him, in defiance of such an order, seizes on any portion of the property secured by it, the wrongdoer will be liable, not only to restore the specific property, but also to pay double the value by way of damages. The husband, or any person claiming under him, may, however, apply to the court, or to the magistrate or justices by whom the order was made, to discharge it; but whilst it is in force the wife is to be exactly in the same position with regard to property as if she had obtained a judicial separation.

The courts of appellate jurisdiction are, the Judge Ordinary from the judge of assize, the full Court from the Judge Ordinary when acting alone, and in the one case of petitions for dissolution of marriage, the House of Lords from the full court (secs. 20, 55, and 56).

Jurisdiction.—The jurisdiction now vested in ecclesiastical courts in respect of divorces *à mensâ et thoro*, suits of nullity of marriage, of jactitation of marriage, for restitution of conjugal rights, and in all matters matrimonial, except as to the granting of marriage licenses, is to be transferred to the new court. A decree for judicial separation is substituted for the divorce *à mensâ et thoro*, and may be obtained either by the husband or wife, on the ground of adultery, or cruelty, or desertion without cause for two years and upwards. The wife in such case, from the date of the decree, and while the separation continues, is to be considered as a feme sole with respect to property, contracts, wrongs, and injuries, and suing and being sued; but where alimony has been decreed, and not duly paid, the husband will be liable for necessities supplied to her. Notwithstanding the separation, she will still be capable of exercising any joint power given to herself and her husband.

Divorces *à vinculo* may also be granted by the new court to the husband for adultery of the wife, and to the wife for any of the following offences by the husband—incestuous adultery, bigamy with adultery, adultery coupled with such cruelty as without adultery would have entitled her to a divorce *à mensâ et thoro*, adultery coupled with desertion for two years or upwards, rape, sodomy, or bestiality. The words “incestuous adultery” mean adultery committed with a woman with whom the husband, if single, could not lawfully contract marriage, by reason of her being within the prohibited degrees of consanguinity or affinity; and the offence of bigamy under the statute will be complete whether committed in the Queen’s dominions or elsewhere. The petition for dissolution is to be dismissed if the court is of opinion that the petitioner has been accessory to or conniving at the adultery, or has condoned it, or is acting in collusion with the respondent. The court also has a discretion as to dissolving the marriage tie, if it find that the petitioner has during the marriage been guilty of adultery, or of unreasonable delay in presenting or prosecuting the petition, or of cruelty towards the other party to the marriage, or of having, without reasonable excuse, deserted or wilfully separated himself or herself from the other party before the adultery complained of, or of such wilful neglect or misconduct as has conduced to the adultery. Power is given to decree alimony to the wife, and to have

the same secured by deed; and in case of her adultery a settlement may be ordered of her property, or part of it, for the benefit of her husband and children. These provisions do not make so complete a change as might, at first sight, seem to be the case, for they substantially embody that which has been the practice with regard to divorce in England during the last 170 years, and the main alteration will consist in reducing the expense attending the dissolution of the marriage tie, and in effecting such dissolution through a court of law, instead of by a special act of Parliament. Thus, since the case of Lord Roos in 1669, it has been the practice of Parliament to grant a divorce on the prayer of the husband for the adultery of his wife; and since the case of Mrs. Addison in 1801, to grant it at the suit of the wife for what may be termed aggravated adultery on the part of the husband. It is true that applications by wives for this relief have been very few—Mr. Macqueen sums them up as five in number; but whenever they have been made, and it has been shown that the husband has been guilty of incestuous adultery, or of adultery with bigamy, or the like, relief has been granted.

Actions for criminal conversation—Costs—Custody, &c., of children.—No action will be maintainable for criminal conversation, but damages may be claimed by a husband from the adulterer, either in a separate petition or in a petition for dissolution of marriage, or for judicial separation; they are to be ascertained by the verdict of a jury, and may be applied by the court for the benefit of the children or the maintenance of the wife. The adulterer, when made co-respondent to any petition presented by a husband, may be ordered to pay the whole or any part of the costs. The court also has power, on petition for dissolution or nullity of marriage, or for judicial separation, to provide for the custody, maintenance, and education of the children, and may direct proceedings to be taken for placing them under the protection of the Court of Chancery.

Re-marriage of divorced parties.—The parties divorced *à vinculo* may marry again after the time for appeal has elapsed, or after an unsuccessful appeal; but no clergyman of the established church is bound to solemnise the marriage of any person who has been divorced for her or his adultery; such clergyman, however, is to permit the use of his church for that purpose to any other clergyman entitled to officiate in the diocese (secs. 2, 6, 7, 16, 26, 30, 31—35, 45, and 57—59).

It may be observed that a standing order of the House of Lords in 1809 required that a clause should be inserted in every divorce bill to the effect that the person whose marriage is dissolved shall not intermarry with the adulterer or adulteress, yet

this clause has been invariably struck out in committee. It has not been retained, says Mr. Macqueen, "because all the feelings of humanity, and all the dictates of policy, suggest that the guilty parties ought not to be debarred from making amends to social order by entering into matrimony. To prevent marriage in such a case would be but to prolong the unseemly spectacle of adultery, and to inflict bastardy on the innocent and helpless offspring." Putting aside that part of the bill which relates to procedure, it will be found merely to give the form of law to pre-existing and firmly-established practice on the subject. The bill permits of divorce *à vinculo* only in case of adultery on the part of the wife, and incestuous adultery, or adultery coupled with incest, or with cruelty, or with wilful desertion, on the part of the husband; it does not prohibit the parties from marrying again, or the adulterer and adulteress from intermarrying. Even now we fall short of the liberty granted to misyoked humanity in all foreign Protestant countries. In Scotland, wilful desertion for four years, followed by a judicial requisition of conjugal rights on the part of the complainant, warrants a divorce.

Procedure of the new court.—With regard to the procedure of the court, the most important section is the 22nd, whereby it is enacted, that "in all suits and proceedings, other than proceedings to dissolve any marriage, the court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be, as nearly as may be, conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this act." If, however, damages be sought against the adulterer, the claim in that respect is to be heard and tried on the same principles, in the same manner, and subject to the same or like rules as prevail in the trial of actions for crim. con. (sec. 33).

Applications to court by petition.—The application for relief to the court or a judge of assize must in all cases be by petition, which is to be served on the party to be affected by it, in such manner as the court may by any general or special order direct, and for that purpose the court will have all the powers conferred by any statute on the Court of Chancery. The court may, however, dispense with such service altogether. If damages be sought from the alleged adulterer, the petition is to be served on him and the wife, unless the court dispense with such service, or direct some other to be substituted. If a decree of nullity or dissolution of marriage, or of judicial separation, in a suit of jactitation of marriage, be sought, an affidavit must be filed verifying the petition, so far as the applicant can do

so, and stating that there is not any collusion or connivance between the deponent and the other party to the marriage (secs. 33, 41, and 42).

Adulterer, &c., to be party.—The alleged adulterer is to be made a co-respondent to a petition presented by a husband for dissolution of marriage, unless otherwise ordered by the court on special grounds; and on like petition by the wife the court may direct that the person with whom the husband is alleged to have committed adultery shall be made a respondent (sec. 28).

Jury—Issues.—On petitions for dissolution of marriage, the parties, or any of them, may insist upon contested matters of fact being tried by a jury, and if damages are sought, they are always to be ascertained by a jury, but in other cases it is in the discretion of the court whether questions of fact shall or shall not be determined by a jury. Issues may also be directed by the court to be tried in any court of common law. Upon the trial, under the act, of any question of fact by a jury, or of any issue, a bill of exceptions may be tendered, and a general or special verdict, or a verdict subject to a special case, may be given; and where the trial has not been had before the new court, they are to be returned into it without any writ of error or other writ, and the matter of law involved therein is to be determined by the full court (secs. 28, 33, 36, 39, and 40).

Evidence.—Witnesses are to be sworn and examined orally in open court, but parties may verify their respective cases, in whole or in part, by affidavit, and be cross-examined and re-examined thereon orally in open court. The attendance of the petitioner may be ordered, and his examination or cross-examination on oath may be permitted at the hearing, but he will not be bound to answer any question tending to show that he has been guilty of adultery. The rules of evidence observed in the common law courts are to be followed by the court in the trial of all questions of fact. Provision is made for enforcing the attendance of witnesses, and for their examination when abroad or unable to attend. The hearing of the case may be adjourned, and further evidence thereon required (secs. 43, and 46—50).

Costs.—The court, and the House of Lords on appeal, have a general power over the costs of the proceedings, but there is not to be any appeal on the subject of costs only (sec. 51).

Appeals.—The time for appealing from the Judge Ordinary to the full court is three calendar months. A like period is named for the appeal from the full court to the House of Lords, on decrees for dissolving marriage; but if Parliament be not then sitting, the appeal must be within fourteen days next after its meeting (secs. 55 and 56). The fees payable

under the act (except on applications to a judge of assize) are to be collected by stamps. Compensation is awarded to proctors, and the salary of the Judge Ordinary is fixed (secs. 19, 60, 64, and 65). The Secretary of State is empowered to order all proceedings relating to marriages, except marriage licenses, to be transmitted from ecclesiastical courts, and provision is made as to decrees made or suits now pending in such courts (secs. 3—5, and 66).

Advocates, proctors, barristers, and solicitors.—Advocates or proctors now practising in the ecclesiastical courts, and all barristers, attorneys, and solicitors, entitled to practise in the superior courts at Westminster, are entitled to practise in the New Court for Divorce and Matrimonial Causes.

CAP. CXLVII. THAMES CONSERVANCY.—This act is the result of the dispute between the Crown and the Corporation of London respecting the right to the soil and bed of the Thames, so far as the tide flows and re-flows. It appears from the recital in the act that the Queen has conveyed all her estate therein to the Corporation, as conservators of the river, upon certain trusts. It is stated in the act that the master and brethren of the Trinity House are entitled to the lackage and ballastage of vessels in the river, that many encroachments have been made on its shores and banks, and that in consequence of the great increase of steam navigation it has become necessary to provide safe and convenient places for embarking and disembarking steam-boat passengers. In order to effectuate the objects of the act, twelve conservators of the river Thames are to be appointed, and incorporated by that title. They will be the Lord Mayor, two of the aldermen, four of the Common Council, the deputy master of the Trinity House, two persons appointed by the Admiralty, one person by the Board of Trade, and one by the Trinity House. The Common Council are to appoint the two aldermen and the four members of their own body, who are to be conservators, and who are to continue in office so long as they are respectively aldermen and members of the Common Council. Provision is made for the supply of vacancies, and it is enacted that no bankrupt or insolvent person is to be a conservator. Officers for carrying the act into execution are to be appointed by the conservators at such salaries as they think reasonable, but the appointment of any new harbour master or deputy harbour master (whose duties are defined by the act) must be approved by the Trinity House. Conservancy meetings are to be presided over by the Lord Mayor, and five of the conservators are to be a quorum. Minutes of the proceedings, appointments, contracts, &c., are to be entered in a book, and to be received in evidence.

The powers given to the conservators by this

statute are very extensive. They may purchase and hold lands. The estate of the Crown and of the corporation in the bed, soil, and shores of the river, together with all rights relating to the conservancy and regulation, and to the port of London, are vested in the conservators, reserving only to the Crown such part of the soil as is adjacent to any department of her Majesty's Government. The conservators are further empowered to enter into contracts for the purposes of the act, and to make bye-laws, rules, and orders for the regulation and improvement of the river and the navigation thereof, and (*inter alia*) for compelling vessels at anchor or otherwise to carry or exhibit lights from sunset to sunrise. Penalties not exceeding the sum of £5 for breach of such bye-laws may be imposed. They may also grant to owners or occupiers of land fronting the river license to make a dock, pier, wharf, embankment, &c., in front of the land. They may authorise the erection of piers and landing-places, or may themselves erect them; free public stairs or landing-places, instead of those of the Watermen's Company, may be provided; toll-houses may be built on or near the piers, &c., where they may demand for every vessel touching at the pier, &c., for the purpose of landing or embarking passengers and goods, for every time of calling, sixpence, to be paid by the master of the vessel. They may require masters of sunken vessels to raise the same, and in default may do it themselves, and sell the vessel, with the tackle, &c.; and if the proceeds are insufficient to pay the expenses, they may recover the remainder from such masters. They are empowered to remove obstructions, and also any floating timber which impedes navigation; to place and lay down necessary buoys and beacons; to cut the banks of the river for the purpose of making, enlarging, or repairing any dock, canal, drain, &c.; to repair wharves, after default of owners to obey notice to that effect, and to recover the expense from such owners; to dredge and cleanse the river; to prevent ballast being taken in places where its removal may be injurious to navigation; and, in short, to do all acts necessary for the preservation of public interests connected with the river. No works, however, are to be commenced or executed upon the bed or shores of the river without the approval of the Admiralty.

CAP. XXXI. INCLOSURE ACTS AMENDMENT.—This is an act to amend and explain the Inclosure Acts; it authorises the Inclosure Commissioners to adjust various details connected with the fencing and exchange of common and Crown lands (ss. 1—6), to compensate any insufficiency of value of the lands exchanged in relation to those for which they are exchanged, by imposing a perpetual rentcharge on the latter (s. 6). It adds provisions to limit, and for

the mode of ascertaining, such rentcharge (ss. 7, 9); and makes it an indefeasible and prior charge on the land (ss. 10, 11). The last provision (s. 12) should be noticed particularly, as it protects town and village greens from nuisances such as arise from any sort of wilful damage, such as destroying fences or permitting animals to graze without lawful authority, or from the deposit of manure, rubbish, &c., by empowering two justices, on the information of the churchwarden or overseer of the parish, or the lord of the manor, to convict the offender summarily in a penalty of forty shillings. It confiscates the rubbish, &c., so deposited to the use of the parish and the repair of the highways and green, and renders the person who deposited it liable to repay to the churchwarden or overseer the expense of removing the rubbish, &c., provided it be not of sufficient value to defray the expense of removal (s. 12).

CAP. XXXV. LONDON BURIALS.—This act amends the 15 & 16 Vic. c. 85 (being "An Act to amend the laws concerning the burial of the dead in the metropolis") so far as relates to the *City of London* and the liberties thereof. By the 15 and 16 Vic. c. 85, power was given to the Common Council to direct the London Commissioners of Sewers to exercise, in reference to the parishes in the city of London, the powers and authorities given to the respective burial boards of the different metropolitan parishes. It was found impracticable to obtain the consent of all the parishes to the exercise of those powers given by the act which were dependent on the consents of the vestries. The new act makes the consent or approval of the *major* part in number of the vestries of the London parishes sufficient to enable the Commissioners of Sewers (i.e. the London Burial Board) to exercise all the powers of the 15 & 16 Vic. c. 85, in those cases in which any vestry consent is required. There are some other provisions regulating the fees payable to incumbents.

CAP. XXXIX.—COLONIAL ATTORNEYS RELIEF ACT.—This, which is an act to regulate the admission of attorneys and solicitors of *colonial courts* in the English superior courts, is one peculiarly interesting to the profession. It recites that in *certain* of the colonies and dependencies, including certain parts of the territories of the East India Company, the system of jurisprudence pursued is founded on or assimilated to the common law and principles of equity as administered in England; and English attorneys and solicitors are admitted as attorneys and solicitors there, on production of their certificates of admission in the English courts, without any colonial service or examination. The object of the act under discussion is, to a certain extent, to give reciprocal facilities to colonial attorneys and solicitors desirous

of being admitted to practise in this country. With this object, the Act provides—

1. That all British subjects, duly admitted and inrolled as solicitors in the superior courts of law and equity in such colonies or dependencies as above mentioned, *and where full service under articles to an attorney-at-law for five years at the least, and an examination as to fitness are required (except in the case of duly-admitted and inrolled English practitioners seeking to practise in the colonial courts) previous to admission—may be, under certain conditions to be presently specified, admitted and inrolled in all or any of the English courts.*

2. The first of these conditions is, that the applicant must pass *an examination in this country* to test his fitness and capacity; and produce thereat a certificate from the presiding judge of the superior court of common law in the colony in question, to the effect that such applicant is duly inrolled as an attorney-at-law and solicitor therein, and entitled to practise as such; and, further, that no charge or accusation has been established or is pending against him in his professional character, or otherwise affecting his fair fame and repute; and also stating the amount of the stamps (if any) paid by such applicant on his articles of clerkship and on his certificate of admission in the colony.

3. The applicant must also make affidavit that he is resident within the jurisdiction of the superior courts of law and equity in England; and has ceased, for a twelvemonth at the least, to practise as attorney or solicitor in any colonial court of law.

We may here mention that the Incorporated Law Society offered some opposition to the measure, and we believe they obtained the insertion of some of the more restrictive provisions. With reference to the important colony of *Canada* (every day becoming more valuable to this country, because making wonderful strides in material prosperity), the following statement, furnished by a Canadian lawyer, respecting the admission of English barristers and attorneys to practise in the courts of law and equity of Canada, will be useful:—

A barrister or advocate from either England, Ireland, or Scotland, is admitted to the Upper Canada bar on giving a term's notice to the Law Society, producing to the benchers satisfactory evidence of his call to the bar at home, certificate of character from a judge of a superior court, and the payment of fees, amounting to about £26 sterling; and as the characters of barrister and attorney may be united, he may also be admitted to practise as an attorney and solicitor after service for a year under articles with some practising attorney in the colony, and undergoing an examination as to qualification. English, Irish, and Scotch attorneys and solicitors may

also practise after a similar examination and service of a year, but they cannot be admitted to the bar until they have passed a preliminary examination in classics and mathematics, been five years (or with a degree three years) on the books of the Law Society, and passed a final examination on legal subjects when the term of studentship has expired. Until this year, service under articles in the colony for three years was necessary before an old-country attorney could be admitted to practise; but a law, passed during the recent session of the Canadian Parliament, not only reduced this period to one year, but also conferred the same privilege on British and Irish barristers; and, as a measure of equal, if not greater, liberality for the admission of colonial attorneys to practise in the courts in this country, has gone through the House of Commons, and passed to its third reading in the Lords, I trust that the time is not far distant when the benchers of the various inns of court will extend the same liberality to the colonial bar—a liberality which I know would be highly appreciated in the Canadian part of our colonial empire, although it would probably be seldom taken advantage of, and for which there is already a precedent in the case of the present Attorney-General of the Isle of Man.

CAP. XLVIII. THE INDUSTRIAL SCHOOLS ACT.—This is one of the many statutes which have been recently passed with a view to the mitigation of the various evils arising out of juvenile vagrancy, &c. There are several provisions in the Act, but it will be sufficient to notice the principal enactments only. It is entitled "An Act to make better provision for the care and education of vagrant, destitute, and disorderly children, and for the extension of industrial schools." It empowers the Committee of Privy Council on Education to certify the creation of industrial schools where children may be fed as well as taught (s. 3), and directs that the committee may withdraw their certificate on the recommendation of an inspector, who is to report to them, at least once a year, on the condition and regulation of the school (s. 4). Under the statute every child, &c. according to the interpretation clause (s. 2), every boy or girl who in the opinion of the justices is above the age of seven and under fourteen, who is taken into custody on a charge of vagrancy under any local or general act, may, on satisfactory proof of the charge having been given before two or more justices, and if the parent, or in case of an orphan if the guardian or nearest adult relative, cannot at once be found, be committed for not more than one week to any industrial school the managers of which are willing to receive the child. Due notice is then to be given to the parent, guardian, or nearest adult relative of the child, if any can be found, of the circumstances of

the custody, and that the matter will be investigated at a time to be specified in the notice, and which must clearly be within the week which forms the legal limit of the first committal (s. 5). On this subsequent investigation the justices may order the child, if convicted of the original charge, either to be delivered up to the custody of the nearest relative or friend above mentioned, on the latter entering into a recognisance for the good behaviour of the child for any period not exceeding twelve months; and in default of such an assurance may commit the child for such a period as they may think necessary for his education and training to any certified industrial school the managers of which are willing to receive him. But in such a case the committal must be made in preference to any school where the religious education is the same as that of the apparent persuasion of the child's parent (s. 6). If a child who has been released on recognisance be convicted of vagrancy again during its term, the surety may be fined forty shillings if the vagrancy be traceable to the neglect of the latter, but not otherwise (s. 7).

CAP. XXXVIII. BOARD OF HEALTH.—This is an act to continue the General Board of Health. By the 17 & 18 Vic. c. 95, s. 8, it was provided that there should be paid to the President of the Board such salary, not exceeding £2,000 a year, as should be from time to time appointed by the Treasury, but that the other members should be unpaid; and that the president should be capable of being elected and of sitting and voting as a member of the House of Commons. The new act, without noticing this provision, enacts, that if the person appointed president shall, at the time of his appointment, hold any office of profit under the Crown, he shall not receive any salary in respect of the office of president; and if, at the time of his appointment, he shall be a member of the House of Commons, he shall not, by reason of such appointment, vacate his seat. The last clause of this section of the act under discussion has been, it is apprehended, introduced with reference to the 6 Ann. c. 7, s. 26, by which any member accepting an office of profit from the Crown (new commissions in the army or navy alone excepted), vacates his seat.

CAP. LXXXVI. ROMAN CATHOLIC CHARITIES.—This is an act to continue for a limited period the exemption of certain charities from the operation of the Charitable Trusts Acts, 1853 and 1858. It recites that "whereas by 'The Charitable Trusts Act, 1853,' it was provided that that act should not for the period of two years from the passing thereof, extend or be in any manner applied to charities or institutions the funds or income of which were applicable exclusively for the benefit of persons of

the Roman Catholic persuasion, and which were under the superintendence or control of persons of that persuasion: and whereas by 'The Charitable Trusts Amendment Act, 1855,' such charities or institutions as aforesaid were exempted in like manner from the operation of the said Amendment Act, and the exemption so extended was continued until the first day of September, 1856, and has since been extended to the first day of September, 1857: and whereas it is expedient that such exemption should be continued as hereinafter mentioned: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sec. 1. Exemption continued until 1st September, 1858.—That the said acts shall not, until the 1st September, 1858, extend or be in any manner applied to the charities or institutions aforesaid.

CAP. LXXXII. MILITIA.—This is an act for the embodiment of the militia, and was occasioned by the sudden demand for the service in India of a large body of the regular troops. Its provisions are as follow:

Sec. 1. Power to her Majesty, &c., to cause the militia to be drawn out and embodied.—It shall be lawful for her Majesty and for the Lord Lieutenant or other chief governor or governors of Ireland respectively, at any time after the passing of this act, and before the 25th March, 1858, to cause all or any part of the respective militias in England, Scotland, and Ireland to be drawn out and embodied in like manner as in the respective cases in which such militias are now by law authorised to be drawn out and embodied.

Sec. 2. Provisions of acts relating to the militia extended to this act.—All the provisions of the acts relating to such respective militias and of all other acts now in force applicable for and in the case of the drawing out and embodying of such militias in the cases in which the same may now by law be drawn out and embodied, and to such respective militias when so embodied, shall be applicable for and in the case of the drawing out and embodying of such respective militias under the authority of this act, and to such militias when so embodied; and all militiamen ordered to be drawn out and embodied under this act shall be subject to the same obligations of service in all respects as if they had been ordered to be drawn out and embodied in a case now provided for by law.

Sec. 3. Provisions requiring the meeting of Parliament within fourteen days not to apply.—So much of the acts relating to such militias as requires that a proclamation shall be issued for the meeting of Par-

liament (if the militia be drawn out and embodied when Parliament shall be separated by an adjournment or prorogation which will not expire within fourteen days) shall not be applicable in the case of the militia or any part thereof being drawn out and embodied under the authority of this act.

Sec. 4. Pay of militia drawn out to commence from the time appointed for their assembling.—The pay of the officers and men of the militia who may be drawn out under this act shall commence from the time appointed for their assembling or joining their respective regiments, battalions, or corps, and not from the date of the order or warrant for drawing out such militia, subject nevertheless to the provisions for postponing the commencement of such pay in the case of any person in such militia who may not join his regiment, battalion, or corps on the day appointed for the purpose.

Sec. 5. Section 4 of 17 & 18 Vic. c. 13 (concerning service of notices), to apply to this act.—Section 4 of the act of the session holden in the 17th & 18th years of her Majesty, chapter 13, shall extend to any case of drawing out and embodying the militia in England, or any part of such militia, under the authority of this act.

CAP. LXXXIII. SALE OF OBSCENE BOOKS, PICTURES, &c.—This is an act popularly called the "Holywell-street Nuisance Abolition Act," the object being to suppress the trade in obscene books, pictures, prints, &c., for which that locality has obtained an unenvious distinction. The main section is the first, authorising the search of suspected premises; the other sections provide for tender of amends, limitations of actions and appeals. The act does not extend to Scotland. The following is the enactment in sec. 1:—"It shall be lawful for any metropolitan police magistrate or other stipendiary magistrate, or for any two justices of the peace, upon complaint made before him or them upon oath that the complainant has reason to believe, and does believe, that any obscene books, papers, writings, prints, pictures, drawings or other representations are kept in any house, shop, room or other place within the limits of the jurisdiction of any such magistrate or justices, for the purpose of sale or distribution, exhibition for purposes of gain, lending upon hire, or being otherwise published for purposes of gain, which complainant shall also state upon oath that one or more articles of the like character have been sold, distributed, exhibited, lent, or otherwise published as aforesaid, at or in connection with such place, so as to satisfy such magistrate or justices that the belief of the said complainant is well founded, and upon such magistrate or justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are

of such a character and description that the publication of them would be a misdemeanor, and proper to be prosecuted as such, to give authority by special warrant to any constable or police officer into such house, shop, room, or other place, with such assistance as may be necessary, to enter in the daytime, and, if necessary, to use force, by breaking open doors or otherwise, and to search for and seize all such books, papers, writings, prints, pictures, drawings, or other representations as aforesaid found in such house, shop, room, or other place, and to carry all the articles so seized before the magistrate or justices issuing the said warrant, or some other magistrate or justices exercising the same jurisdiction; and such magistrate or justices shall thereupon issue a summons calling upon the occupier of the house or other place which may have been so entered by virtue of the said warrant to appear within seven days before such police stipendiary magistrate or any two justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed; and if such occupier or some other person claiming to be the owner of the said articles shall not appear within the time aforesaid, or shall appear, and such magistrate or justices shall be satisfied that such articles or any of them are of the character stated in the warrant, and that such or any of them have been kept for any of the purposes aforesaid, it shall be lawful for the said magistrate or justices, and he or they are hereby required, to order the articles so seized, except such of them as he or they may consider necessary to be preserved as evidence in some further proceeding, to be destroyed at the expiration of the time hereinafter allowed for lodging an appeal, unless notice of appeal as hereinafter mentioned be given, and such articles shall be in the meantime impounded; and if such magistrate or justices shall be satisfied that the articles seized are not of the character stated in the warrant, or have not been kept for any of the purposes aforesaid, he or they shall forthwith direct them to be restored to the occupier of the house or other place in which they were seized."

THE STATE AND PROSPECTS OF THE PROFESSION.

Delays in the Chancery Offices—Administration of Oaths by London Commissioners—Sheriffs' Fees—Remuneration of Solicitors in Chancery—Agency for Irish Business—Hong Kong Law as to Solicitors' Costs.

It is pretty well known that solicitors are just now in a rather feverish state regarding their position and prospects, and this is not very astonishing when it is

considered how much business, and the profits of it, have declined, whilst a constant accession of new practitioners is taking place. There can be no doubt that it is most desirable to expedite business, and to remove all impediments, particularly such as affect the profession personally. Therefore it is that we are pleased to find that the Incorporated Law Society are alive to the importance of these matters; and we find, from their last report, that they do not despair of eventual success.

Delays in the Chancery offices.—Notwithstanding the large diminution which has been effected in the expense and delay of Chancery proceedings by the recent statutes and orders of court, there are still several complaints of delay in conducting the business at some of the offices of the court. Although causes are heard, motions made, and decrees and orders pronounced, with as much expedition as can be desired on the part of the suitors, consistently with a due and proper attention to their interests, it is the subject of very general complaint that such decrees and orders are not promptly issued and carried into effect. The truth is, that there are numerous delays at the four principal offices where the details of the business of the court have to be investigated and completed—namely, at the Chief Clerk's Offices, the Registrar's Office, the Taxing Master's Offices, and the Accountant-General's Office; and without imputing blame to any of the present officers, the council are of opinion that the evils complained of require to be redressed, and they have now under their consideration suggestions for expediting the dispatch of business in the several offices above mentioned.

Administration of oaths by London Commissioners.—According to the present practice, commissions for taking affidavits in the several superior courts of common law are issued to every attorney residing at the distance of ten miles or upwards from London; but such commissions do not authorise the administration of an oath within ten miles of London. The consequence of this restriction is, that any deponent residing ten miles or more from London can make an affidavit in any action or other proceeding before the nearest attorney who has obtained a commission, at any hour most convenient to all parties; but if the deponent reside in London, or within ten miles, he must either travel beyond ten miles from London to a commissioner, or must attend the court, or at the judge's chambers, within certain limited hours. It has therefore been submitted to the Chief Justices and the Chief Baron that the public convenience and the saving of expense to the suitor in common law proceedings would be consulted by granting commissions to a sufficient number of attorneys carrying on business in different parts of London to the

distance of ten miles therefrom. The council have not yet received a reply to their application.

Sheriffs' fees.—A memorial from several under-sheriffs, setting forth the alterations which had taken place since their fees were regulated in the year 1837, having been presented to the judges, the subject has been taken into consideration by the council; and the masters of the common law courts have been attended; and considering the circumstances urged by the under-sheriffs, the council are of opinion that there should be a complete revision of the whole of the sheriffs' fees; and the scale, when satisfactorily arranged between the practitioners on the part of the suitors and the under-sheriffs and their officers, might be submitted to the masters for the purpose of obtaining the sanction of the judges.

RENEWALS OF ATTORNEYS' CERTIFICATES.

Re-examinations ordered—Suspended, &c., Attorneys re-admitted—Renewals without usual Notices, Partnerships in prospect—Practising without Certificates, fine as well as Arrears—Barristers, formerly Attorneys, re-admitted.

The following may be useful to some of our readers, as it relates to the re-admission of attorneys and the renewal of their certificates under circumstances which are of general application. The applications for renewal of certificates have been numerous in each term. The affidavits in support thereof have been considered, and in several instances, where the parties had ceased to practise for several years, an examination has been suggested to the judges, prior to the renewal of their certificates, and orders have almost always been accordingly made for that purpose.

In one of the cases, an attorney who had been suspended from practice for two years, at the instance of the Incorporated Law Society, was allowed to renew his certificate on the production of satisfactory testimonials of subsequent good conduct. In another, where the attorney had been struck off the roll for an alleged improper interference in a criminal prosecution, but had for several years subsequently established an unexceptionable character, and was offered a partnership in a respectable firm of solicitors, the Council felt justified in merely seeing that the facts were brought before the court, and making no opposition to the application for re-admission.

Applications have also been considered for the renewal of certificates without the usual notice, upon the parties entering into partnership or other urgent occasions, and these cases have been strictly investigated, and testimonials required of the respectability of the applicants.

In other instances, where the applicants had practised extensively for several years in defiance of the stamp laws, it was considered that the renewal of the certificates should be opposed, and that it was not sufficient to pay the arrears without a substantial fine, and this has accordingly been done.

In one of this class of cases, the facts relating to which were communicated by one of the Provincial Law Societies, an uncertificated attorney had practised in the name of another attorney who had left the country. By the 22nd section of the 6 & 7 Vic. c. 78, attorneys are prohibited from permitting their names to be used upon the account or for the profit of an unqualified person. The agreement between the persons complained of showed that the uncertificated attorney was really participating in the profits of the business conducted in the other's name. In the absence, however, of any proof of malpractice in the name of the attorney in question, the judge granted an order upon payment of the arrears of duty.

In some instances applications have been made by members of the bar, who formerly practised as attorneys, to be re-admitted on the roll; and these gentlemen having been disbarred, and the affidavits being deemed satisfactory, no opposition has been made to their re-admission.

NOTICES OF NEW BOOKS.

HORSEY'S PROBATE ACT, 1857.

The Probate and Administration Act, 1857 (20 & 21 Vic. c. 77), with Notes and Index, and a Summary of the Law of Executors and Administrators in reference to Probates and Administrations. By GEORGE HORSEY, Esq., of Gray's-inn, Barrister-at-Law; and Lecturer's Prizeman, 1849. London: Shaw and Sons.

The two most important statutes of the last session are undoubtedly those relating to probates and administrations, and divorces; and as they provide for the erection of new tribunals, they will necessarily exert a lasting influence, which will compel legal practitioners at least to make themselves acquainted with the objects of their jurisdiction, and the course of practice pursued therein. It was easy to foresee that the opportunity afforded by the passing of these acts would be taken advantage of by many would-be authors; and already some have produced their offspring, the result of more or less protracted sittings; whilst others are yet busy in the process of incubation, and will doubtless furnish the legal public with a fitting pabulum; in some instances, it is to be feared, over-doing the thing, proceeding *ab ovo usque ad malum*. Our present purpose,

however, is limited to the notice of some of the works issued on the Probate and Administration Act, and the first among these is Mr. Horsey's edition of the act. This gentleman is already favourably known by his edition of "PURCHASE DEEDS, &c.," and this will afford some guarantee that his present labours will not be without profit to the profession. He appears to us to have adopted a very good plan, under the circumstances of the case. For instead of producing a treatise on the new law (which can only be usefully done after the course of procedure is settled), he has furnished a little work which commences with an introduction giving a concise and intelligible statement of the provisions of the act (a sort of run-and-read summary); followed by the act itself, furnished with short and pithy explanatory notes; and that followed very appropriately by a "Summary of the Law of Executors and Administrators in reference to Probates and Administrations." In addition to which the volume is furnished with a table of contents, and an index. This work will, we think, answer effectually all the purposes of the practitioner or student, until the lapse of such a time as will justify the production of a more complete and larger treatise. The "Summary" will be especially valuable to those who may require an intelligible statement of the law on points relating to the offices and duties of executors and administrators, and the mode of their appointment. This summary being placed at the end of the work, can be more conveniently read and understood than if placed in shreds and patches against the appropriate sections of the act. We observe, too, that the author has given a reference under the various sections to the proper part of the summary. It is impossible for us to furnish extracts from the work which would afford an adequate representation of the labours of Mr. Horsey, for the many notes (independently of the summary) contain, in a short space, much useful matter, though necessarily of a fragmentary character. From the Introduction, we take the following:—

"The evils which, in a community like England, arose on the system of probate and administration, soon manifested themselves. They consisted principally of the numerous jurisdictions entitled to grant administration, and consequently to have wills proved before them. Of these jurisdictions there is no reason for speaking at any length. Their name is 'Legion,' but professionally styled prerogatives, diocesan, and peculiars. Of prerogatives there were but two—Canterbury and York. Of 'Diocesan,' not less than the number of English bishops. But of 'Peculiars,' which were so called because they were exempt from the ordinary, and had a peculiar and special ordinary of its own, the number was of

several sorts: 1. Peculiars of archbishops, more than one hundred of which were within the province of Canterbury; 2. Peculiars of bishops, exclusive of the bishop; 3. Peculiars of bishops, exclusive of archdeacons; 4. Peculiars of deans, deans and chapters, prebendaries, and the like; and lastly, royal peculiars, which were so highly peculiar and exempt, that it is quite pleasing to be no longer troubled with defining them.

"From one or other, and not unfrequently from more than one of these authorities, the administration or probate had to be obtained, and care was to be taken that the right court was applied to, for if it were not the proper tribunal, the payment of duty, fees, &c., was all thrown away, so far as the giving validity to the administration or probate was concerned. It was not, of course, always easy to determine to which of these jurisdictions an executor or intending administrator should direct his steps. That was regulated by the notable goods (*bona notabilia*) the deceased had in the jurisdiction. But then he might have had notable goods in two jurisdictions, and in that case the Prerogative Court was the safer tribunal, though not always, for sometimes a prerogative grant and a peculiar grant were each necessary, within the same province. Further, a prerogative Canterbury grant was as nothing to goods in the province of York, and thus two grants were frequently necessary for the same deceased on account of property in both provinces. The vexation of all this was slightly soothed by the distinction which existed between *void* and *voidable* probates; thus, a diocesan or peculiar probate or administration might be shown to be void on any occasion; and when so shown, it was as if no probate or administration had been obtained; but a prerogative probate was, if wrongly obtained as to jurisdiction, only voidable and good until revoked by the court granting it, and which was rarely, if ever, done upon any litigation between the executor or administrator and third persons. There was, consequently, the most frequent application to the prerogative courts, and as the province of Canterbury comprised London, with the Bank of England, and all the Government Stocks which were *bona notabilia*, in the London diocese, the greatest number of probates and administrations issued from Canterbury, and the most likely registry in which to find a will was at its Doctors'-Commons registry.

"The foregoing sketch of the existing law of probate and administration will serve as an introduction to the alterations effected by the present act. Its operation is confined to England; and all jurisdiction in relation to the grant and revocation of probates and administration are to be exercised in her Majesty's name in one court, to be styled 'THE

COURT OF PROBATE. As a necessary preliminary, the voluntary and contentious jurisdiction of all ecclesiastical, royal peculiar, peculiar manorial, and other courts and persons in England are to cease, and the necessary jurisdiction to supply their places is vested in her Majesty, and to be exercised by her in the Court of Probate. This court is to be presided over by one judge, ranking with the Puisne Common Law Bench, and with a salary which will ultimately be £5,000.

"The kingdom is parcelled out into forty districts, corresponding to the divisions of the Reform Act as to the counties, each of which districts is to have a registry in which wills may be proved and administrations granted where no contention arises thereon. These are all to communicate their acts, and copies of the wills proved, to the principal London registry, so that a search there will give the evidence of every will proved in the kingdom, and every administration granted.

"The court will be one of record, and its powers in England the same as those of the prerogative courts, but no suits for legacies, or for the administration of estates, are to be entertained by the court. Matters of fact may be tried either by an issue to a court of law, or by a jury before itself upon a defined question.

"An appeal lies to the House of Lords direct, and as a matter of right upon a final decree, but upon any interlocutory order not without leave of the court. An appeal, however, from a final decree places all interlocutory orders under appeal. The bar of the court is open to the advocate of Doctors'-Commons and the barrister-at-law, and the former is to be entitled to practise as a barrister-at-law. Proctors are also at liberty to practise in the court, and also as solicitors and attorneys upon application by them, for that purpose, within one year after the act passed. Articled clerks to proctors are to be considered as having been articled to solicitors as regards their subsequent admission to practise. Solicitors and attorneys complete the class of practitioners, and such of them as are commissioners for taking oaths in Chancery are authorised to take oaths in the Court of Probate."

From the notes to the act we select the following on the subjects of appeal, and the practitioners of the new courts (secs. 39, 40).

"The consequence of an appeal from a final decree which is to be of right, being as above provided to place all the interlocutory orders under appeal, may operate inconveniently to the respondent, unless some provision be made for notice to him that such orders are intended to be appealed against. It might happen that a final decree was valid in itself, though invalid from some irregular

interlocutory order. If then an appeal be presented against the decree, the support of which the respondent would principally direct his attention to, it would be a surprise for him to find it was the interlocutory order which was really to be attacked and required to be supported. It will, however, probably have been made the subject of an application for leave to appeal, so that notice will thus be obtained, or which is more likely, the mode in which cases on appeal are presented to the House of Lords, with the reasons for the reversal, which are appended, will necessarily bring out notice of any interlocutory order which is intended to be made the subject of appeal.

"There seems some attempt in this section at an exclusion of barristers from the same benefits as advocates. The latter are to be entitled 'to practise as advocates or counsel in all matters and causes,' whereas barristers are to be entitled 'to practise as advocates or counsel in all contentious matters and causes.' The distinction seems unnecessary, if nothing be meant by it; and unfair, if there be a difference. As the privilege, if any, reserved to the advocates is only to those who are ecclesiastical advocates at the passing of the act, who will not live for ever, it may be asked, who, on their departure, are to supply their places in the department they are to fill to the exclusion of the barristers? There is no provision for any future advocates; and the result of any exclusive privilege would be to create a monopoly, unfair and inconsistent with the free right for advocates to practise as barristers in all courts of law and equity."

From that portion of the "Summary" which treats of the "Manner of Proving," we extract the following short statement, as our limits will not allow more.

"*In ordinary cases.*—There were two modes of proving a will. In *common form*, and in *solemn form*, and these are continued by the late act. The *common form*, which was the usual way, was simply by the presentation of the will on the oath of the executor, to the effect, that the writing exhibited contained the last will and testament of the deceased as far as the executor knew or believed. Also that he would truly perform the same by paying first the testator's debts, and then the legacies therein contained, as far as the goods, chattels, and credits extended, and the law charged him, and that he would make a true and perfect inventory of all the goods, chattels, and credits of the deceased, and exhibit the same into the registry of the spiritual court at the time assigned him by the court, and render a just account thereof when lawfully required (Toller, 58). Also of the time the testator died and (by the Stamp Act), as to the value of the personality (*post*, p. 135).

"This was all that was required as to wills made before the Wills Act (1838). Before that time, as witnesses were not required to a will of personal estate, no evidence of the mode of execution was required by the ecclesiastical courts; but as the Wills Act denies effect to any instrument as a will, unless it be attested in the manner specified in the act, the spiritual courts, in some instances, required a preliminary proof that the solemnities of the act had been observed. Thus, although the act does not require any statement in the attestation by the witnesses that the solemnities have been observed, and expressly enacts that no form of attestation shall be necessary, yet it frequently happens that wills are made with an attestation clause, which, although attempting, does not, by its terms, show that all the forms of the act have been gone through, or it may state something to have been done contrary to the act. In these cases, though the will is not dependent upon the attestation clause for validity (for it is the actual performance and observance of the forms which is to determine the fact of a will, and not the statement of them), yet the ecclesiastical courts, before admitting an instrument, which on the face of it does not appear to be a will according to the statute, requires that the witnesses should, by their oath, depose in what manner the will was executed and attested. If the evidence thus obtained showed a compliance with the act, the will was admitted to probate (see *ante*, p. 84, for suggested form of attestation).

SCOTT'S PROBATE ACT, 1857.

Probates and Letters of Administration Act, with Explanatory Observations, shewing the Principal Alterations in the Law effected thereby: with an Index. By JOHN SCOTT, Esq., Barrister-at-Law. London: Wildy and Sons.

The above is another work on the Probates and Administrations Act, but it is of a different order to that of Mr. Horsey, consisting of nothing but an introduction, the act itself (without a note), and an index. Of the value of the introduction, the following extract will, perhaps, furnish a good notion, though it is only, perhaps, a brick of the edifice, but still a rather large one compared with the edifice itself:—

"The provisions contained in the 20 & 21 Vic. c. 77, 'An Act to amend the Law relating to Probates and Letters of Administration in England,' are founded mainly upon the recommendations of the commissioners appointed to inquire and report upon the jurisdiction and authority of the ecclesiastical courts in England. These recommendations are

embodied in two reports, the former of which was made in the year 1832, and the latter in 1854. The alterations, however, effected by the statute fall very far short of those suggested by the learned commissioners, and, notwithstanding the length of time that has elapsed since the issuing of the first report, seem to have been made with more haste than consideration.

"The period at which the act is to come into operation (which, by s. 1, is not to be anterior to the 1st of January, 1858) has not yet been determined upon; but, in all probability, circumstances will render it necessary to delay its commencement until long after the day mentioned.

"The interpretation clause (s. 2) gives a definition to 'will,' 'administration,' 'matters and causes testamentary,' and 'common form of business.' The 3rd section provides that the voluntary and contentious jurisdiction of all ecclesiastical, royal peculiar, peculiar, manorial, and other courts and persons in England, so far as regards their authority in relation to matters or causes testamentary, or to any matter arising out of or connected with the grant or revocation of probate or administration, shall cease; and the jurisdiction thus abolished is by s. 4 vested in a court to be called the 'Court of Probate,' the principal registry whereof is to be in London or Middlesex. The jurisdiction so abolished is thus described by the commissioners at p. 21 of their first report: 'The peculiar jurisdictions in England and Wales, with the manorial courts, amount in number to nearly 800. These jurisdictions are of several kinds,—royal peculiars; peculiars belonging to the archbishops, bishops, deans, deans and chapters, archdeacons, prebendaries, and canons, and even to rectors and vicars; and there are also some of so anomalous a nature as scarcely to admit of accurate description. In some instances, these jurisdictions extend over large tracts of country, embracing many towns and parishes, as, the peculiar of the Dean of Salisbury. In others, several places may be comprehended, lying at a great distance apart from each other. Again, some include only one or two parishes. The jurisdiction to be exercised in these different courts is not defined by any general law. It is often extremely difficult to ascertain over what description of causes the jurisdiction of any particular court operates; and much inconvenience results from this uncertainty. This variety of jurisdiction has proceeded from different causes connected with the history of the church, which it is not necessary here to specify. The peculiars were always considered as interfering with the beneficial exercise of the authority of the bishop of the diocese; and proposals have been advanced, at different times, to remove the inconvenience.'

"The administration of this branch of the law is now effectually cleansed from this blot.

"The 5th to the 12th sections of the act contain provisions for the appointment, the tenure of office, the oath, the rank and precedence, the salary, and the retiring allowance of the judge of the new court. The 13th section provides for the establishment of the forty 'district registries' mentioned in schedule A.; and the following sections to 21 inclusive relate to the appointment of the various officers and clerks of the Court of Probate, and of the principal and district registries, their salaries, qualifications, tenure of office, and duties.

"The 22nd section empowers the judge of the Court of Probate to cause seals to be made for the court and for the principal and each district registry, and makes 'all probates, letters of administration, orders, and other instruments and exemplifications, and copies thereof respectively,' purporting to be sealed with the seal of court, receivable in evidence without further proof: and s. 28 imposes penalties on persons forging or counterfeiting such seals or the signatures of registrars, &c.

"The court is, by s. 23, to be a court of record, and to have the same powers in relation to the personal estate in all parts of England of deceased persons as the Prerogative Court of Canterbury had in relation to matters and causes testamentary within the jurisdiction of that court, with a proviso that 'no suits for legacies, or suits for the distribution of residues, shall be entertained by the court, or by any court or person whose jurisdiction as to matters and causes testamentary is hereby abolished.'

"Sections 24 and 25 relate to the examination of witnesses and production of deeds.

"The mode of taking evidence in the ecclesiastical courts heretofore was, by 'depositions' taken by examiners employed for that purpose by the registrars, or, if the witnesses resided at a great distance, or were otherwise unable to attend, they were examined by commission. The examination did not take place upon written interrogatories previously prepared and known; but the 'allegation,' or plea, was delivered to the examiner, who, after making himself master of all the facts pleaded, examined the witnesses by questions which he framed at the time, so as to obtain upon each article of the allegation separately the truth and the whole truth, as far as possible, respecting such of the circumstances alleged as were within the knowledge of each witness. The cross-examination was conducted by interrogatories addressed to the adverse witnesses; and, when the deposition was complete, the witness was examined upon the interrogatories delivered to the examiner by the adverse proctor, but not disclosed to the witness till after the examination in chief was con-

cluded and signed, nor to the party producing him till publication passed.

"Now, however, in all contentious matters where their attendance can be had, the witnesses are (s. 31) to be examined orally by or before the judge in open court, and (s. 33) according to the rules of evidence observed in the superior courts—the Court of Probate having, by s. 32, power to issue commissions for the examination of witnesses abroad, or who are unable to attend.

"Section 26 makes provision for the production of testamentary instruments, and the examination of persons having control over or knowledge of them; and s. 27 for the administering of oaths by the registrars, district registrars, surrogates, and commissioners to be appointed for the purpose, and also for the substitution of affirmations or declarations in lieu of affidavits or depositions, and the penalty for false affirmations, &c."

SUMMARY OF DECISIONS.

EQUITY AND CONVEYANCING.

COPYRIGHT.—*Account of the produce of sale of pirated work.*—By s. 23 of the 5 & 6 Vic. c. 45, all copies of a work unlawfully printed without the consent of the proprietor of copyright, shall be deemed to be the property of such proprietor of the copyright, and he shall be entitled to sue for and recover the same or damages for the detention thereof, in an action of detinue, from any person who shall detain the same, or to sue for, and recover damages for the conversion thereof in an action of trover. Formerly, the pirated copies were destroyed. As to the *sold* copies, courts of equity never gave more than the profits made by the sale of the pirated copies of the work; and this course is still adhered to, as shown in the following case, where it was held, that though the registered owner of the copyright in a work is entitled to have all the unsold copies of a piratical edition delivered up to him for his own use, without making any compensation for the cost of production or publication, yet, as to the copies of such piratical edition which may have been sold, he is not entitled in equity to the gross produce of the sale thereof, but only to the profits which the defendant may have made by the sale thereof. *Delf v. Delamotte*, 3 Jur. N. S. 933.

FEME COVERT.—*Liability for debts where she has separate estate* [vol. 2, p. 407]—*Retainer of solicitor.*—Wherever a woman has property settled to her separate use, and she enters into any contract, by which it clearly and manifestly appears that she intends to create a debt against herself personally, if the expression may be used, it will be assumed

that she intended that the money should be paid out of the only property by which she could fulfil the engagement. All that is requisite is to show a clear intention expressed on her part to take the debt on herself; although that would not make her personally liable, it will be assumed that she intended to pay and discharge the amount out of her separate estate. In *Murray v. Barlee* (4 Sim. 90; 3 Myl. and Ke. 209), which was the case of a solicitor, Lord Brougham says, that a retainer is an implied promise to pay whatever may be really and properly incurred in respect of that retainer; and, therefore, he held, that in the case of a married woman giving a retainer, or instructions emanating from herself personally; as distinguished from her husband, all the consequences would follow which would flow from a charge upon her separate estate. In the following case it appeared that real property belonging to a female was, upon her marriage, conveyed to such uses as she should by deed or will, notwithstanding coverture, appoint; and subject thereto, to the separate use of herself during the joint lives of herself and husband; remainder to the use of herself for life; remainder over. She employed a solicitor, during her husband's life, first to mortgage the lands, and then to sell the equity of redemption. The sale was not completed during his life, although the mortgage was: Held, that the solicitor was entitled to be paid his costs out of the purchase money (which, according to the contract, was to come to her separate use), when the same was paid after her husband's decease, although she could then have no separate estate. A retainer implies a promise to pay all costs rightly and properly incurred upon the retainer. A retainer by a married woman to a solicitor to act in respect to one portion of her separate estate operates as a charge upon all property settled to her separate use, and is not confined to the particular property upon which the solicitor is called upon to act. Where a married woman, having property settled to her separate use, evinces a clear intention to take a debt upon herself, it will immediately be assumed that she intends it to be paid out of her separate estate, and her separate estate will be charged accordingly. *Bolden v. Nicholay*, 9 Jur. N. S. 884.

FEME COVERT.—*Separate estate* [vol. 3, p. 988]—*Mortgagor and mortgagee*—*Charge*—*Solicitor and client*—*Transfer of debt*—*Purchase by solicitor* [vol. 3, p. 311].—The following is a very complicated case in its circumstances, but as involving the doctrines of the liability of the separate estate of a feme covert for her debts, and the right of a solicitor to obtain security for his debt from his client as to the first, it shall be observed, that it is clearly settled upon the equities between husband and wife,

that if a married woman be entitled to the equity of redemption of an estate settled to her separate use at the time of her marriage, and the mortgage debt, which left to her only such equity of redemption, be paid off by her husband, he can so deal with such mortgage debt as to acquire for himself and for his own benefit a right to stand in the place of the original mortgagee. The husband, so paying off such mortgage debt and obtaining possession of the title-deeds, can, as against his wife and her assigns, retain the deeds until he or his estate be indemnified for the amount paid by him. As to the second point above referred to, the well-established doctrine, as laid down in *Carter v. Palmer* (8 Cl. and Fin. 657), is not now to be shaken; and any trustee or solicitor, who in the course of confidential employment in either of the above capacities happens to acquire a knowledge which enables him to deal with property in which his cestuis que trust or clients are interested, will not be permitted in a court of equity to avail himself of the benefit of any such dealings. But it is another thing to say, if a debt be fairly due to a trustee or a solicitor from his cestuis que trust or client, that his right to that debt is so far annihilated that no security which he may obtain in respect of such debt can stand. It appeared that certain hereditaments belonging to the plaintiff were, upon her marriage with J. W. in 1831, vested in trustees to the separate use of the plaintiff for life, with remainder to the use of such person, &c., as she should appoint; and in default, in trust to pay the rents, &c. to or permit her to receive the same for life; and after her death, to the use of her husband for life, with remainder to the children, &c. At the date of the marriage the hereditaments were subject to a term of 1,000 years, created to secure the payment of £300 and interest, but such sum had long been paid off, although no assignment of the term was made. In March, 1833, the hereditaments were, by the plaintiff and her husband J. W., appointed, &c., to secure the sum of £250 and interest, and the term was assigned to a trustee to secure the payment, and subject thereto, in trust for the person, &c., entitled to the equity of redemption. J. W. died in Oct., 1836; and the plaintiff, shortly after his death, paid off the £250. In March, 1837, the plaintiff charged the hereditaments with the payment to J. T. of £400 and interest; and the term was again assigned to a trustee for him, and subject thereto, in trust for the person, &c., entitled to the equity of redemption. In Feb., 1838, the plaintiff married S. U., but no settlement was then made; and in Oct., 1838, the £400 due to J. T. was paid off, and the indentures of March, 1837, and the title deeds of the hereditaments, were given up to S. U., but no reconveyance of the heredita-

ments or re-assignment of the term was made. S. U. delivered the deeds to his solicitor, J. B., to whom, as alleged, he was indebted to a large amount; and in Feb., 1841, S. U., by indenture, agreed with J. B. to charge the debt upon the said hereditaments. The plaintiff did not execute the indenture of Feb., 1841. The larger part of the debt due to J. B. was for costs incurred in defending a suit, first on behalf of the plaintiff, and subsequently of herself and her husband. In 1843 J. B. entered into possession of the hereditaments, &c., and had ever since continued in such possession. Although all principal and interest due to J. T. had been paid, yet it was alleged that he, as mortgagee, had paid the sum of £175 for certain costs, which he was entitled to recover under the mortgage security; and in Sept., 1854, he, in consideration of £40, assigned this debt to J. B., and conveyed the hereditaments to him to secure the amount due to him. S. U. died in Dec., 1855, and shortly afterwards the plaintiff filed this bill, to have, *inter alia*, the indenture of Feb., 1841, declared void; that J. B. was not entitled to any larger sum than £40; and that, in taking the accounts, he would not be entitled to be paid the sum alleged to be due, and secured by the indenture of 1841: Held, that J. B. was entitled to the principal and interest secured by the indenture of 1841, and also to the £40 and interest from Sept., 1854; to his costs of the suit, and in defending his mortgage title; and that the indenture of March, 1837, and the amount due thereon to J. T., were to stand as security for the payment of the amount found due to J. B.; and the court ordered an account against J. B. as mortgagee in possession. *Nelson v. Booth*, 3 Jur. N. S. 951.

INSOLVENT DEBTOR.—*Discharge*—*Subsequently acquired property* [vol. 2, p. 57; vol. 3, p. 161]—*Administration of assets*—*Representative of deceased insolvent debtor suing*.—The following is an Irish decision, on the Irish Insolvent Act clauses (analogous to those in the English Act) as to the future estate of an insolvent debtor. In *Thomas v. Purell* (15 Beav. 148), where it appeared that the debt was barred, not by the Insolvent Debtors Act only, but by the Statute of Limitations, the Master of the Rolls decided that the subsequently acquired property could not be made available, as the mode pointed out by the statute had not been followed, and that case appears to have proceeded upon the same principle as Sir J. Romilly acted upon in the subsequent case of *Re Moylan* (16 Beav. 220), because that was the case of a bond creditor, whose debt was not barred by the Statute of Limitations, and he, in the most precise language, declared that no judgment having been entered upon the warrant of attorney (see vol. 3, p. 161), the

future estate of the insolvent could not be affected, and that whether the debt existed or not, the remedies at law and equity were gone; upon the same principle upon which it has always been held that a demand is barred by the Statute of Limitations, as the remedies for it are lost. In the following case it appeared that H. became an insolvent in the year 1851, and took the benefit of the act for the relief of insolvent debtors. D., a judgment creditor of H., was appointed his assignee in the insolvency, and his debt was inserted in the schedule. In the course of the same year H. was discharged, having executed the usual warrant of attorney for the assignee to enter up judgment pursuant to the 3 & 4 Vic. c. 107 (Irish Insolvent Act); but no judgment was actually entered up. Subsequently to his discharge H. acquired some personal property, and died in the year 1855: Held, that the personal representative of D. could not maintain a suit for the administration of the property acquired subsequently to the insolvency. *Dunlevie v. Hart*, 30 Law Tim. Rep. 23.

LANDLORD AND TENANT [*ante*, pp. 91, 122].—*Letting by steward—Lease*.—The appointment, by a landlord, of a paid steward to manage and let his property, does not of itself convey to the steward an authority to let a farm so as to bind the landlord. *Collen v. Gardner*, 21 Beav. 540.

PARTNERSHIP.—*In mines—Management—Dissolution by decree—Directing alteration in working—Disagreement between owners, manager, and receiver*.—A colliery partnership being dissolved by decree, and a sale of the colliery, as a going concern, directed, the court will not, until it be found impossible to effect a sale, direct such an important alteration in the working as the cutting through a fault, although the evidence was all on one side as to the economy of working to ensue on such a course, there being no immediate necessity for such cutting in order to carry on the concern. When part owners of a mine cannot agree on a plan for working it harmoniously, a court of equity will interfere to appoint a manager and receiver, and will do so if the circumstances seem to render such a course advisable, when a sale has been directed. *Lees v. Jones*, 3 Jur. N. S. 954.

POWER [*ante* p. 85].—*Power to wife to appoint in default of husband's appointment—Appointment to grandchildren not objects of power* [vol. 2, p. 369].—*Election* [*ante*, p. 84; vol. 2, pp. 27, 195, 200].—Where a settlement gives the wife surviving the husband a power to appoint by will, in default of direction, limitation, or appointment by the husband, the legal effect of such provision is, to give the wife a power of appointment in respect of any portion unappointed by the husband, or not completely or

validly appointed by him. A father, having a power of appointment among all his children, by his will, purporting to make an appointment of the whole of the fund, excluded one child, and appointed a portion of the fund to grandchildren who were not objects of the power: Held, that the appointment was valid as far as it related to the portion of the fund appointed to the children. But having given other legacies by the will to the children in whose favour he had appointed: Held, that they were bound to elect in favour of the grandchildren. *Ex parte Bernard, in the matter of Leigh's Trust*, 6 Ir. Ch. Rep. 133.

RAILWAY COMPANY.—Priority of preference shareholders.—Railway Company—Fraud.—The following decision sustaining the priority of preference shareholders in a company, has an interest beyond the peculiar circumstances of the case, which originated in the frauds of the notorious Redpath. A sum of £243,923 net revenue of the Great Northern Railway Company was admitted to be applicable to dividend for the half-year ending December 31, 1856. Shortly before that date, an officer of the company had by forgeries defrauded his employers to nearly that amount. *Preference shareholders* filed a bill claiming their full dividends from June, 1856, and seeking an injunction against payment to ordinary shareholders until after satisfaction of the claims of the preference shareholders: Held, that the preference shareholders were entitled to the declaration, and perpetual injunction prayed, restraining the company from declaring or paying any dividend upon the ordinary original stock, the A. stock and the B. stock, without regard to the rights of the preference shareholders to be paid in priority their dividend from the 30th June, 1856; that sect. 3 of the act passed in 1857, consequent on the discoveries of the frauds of the officer of the company, was to be construed as cumulative, by way of security for, and not in substitution of, such preference dividends. *Henry v. The Great Northern Railway Company*, 30 Law Tim. Rep. 10.

RAILWAY COMPANY [*ante*, pp. 81, 86].—*Lands and Railways Clauses Consolidation Acts, 1845* (c. 18, s. 68; c. 20, s. 6)—“*Lands injuriously affected*”—*Injury must be actionable*—*Execution of works*—*Vibration by use of railway after completion of line*—*Overlooking from railway*—*Certiorari*.—By sec. 6 of the 8 & 9 Vic. c. 20 (the Railways Clauses Consolidation Act, 1845), the company are to make to the owners and occupiers of “any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained” by such owners and occupiers “by reason of the exercise as regards such

lands, of the powers by this or the special act, or any act incorporated therewith, vested in the company.” That section, together with sec. 16, defines who is entitled to compensation; and sec. 68 of stat. 8 & 9 Vic. c. 18 (the Lands Clauses Consolidation Act, 1845), prescribes the method of settling the claim, “if any party shall be entitled to any compensation in respect of any lands, or any interest therein, which shall have been taken or injuriously affected by the execution of the works.” Under the provisions of the above acts, it has been held that it is not every kind of disturbance that entitles a party to compensation; it is necessary to draw the line somewhere. It is difficult to say that for every fanciful ground of complaint compensation is to be given, as for the obstruction of a prospect which might detract from the agreeable enjoyment of a house. A well-defined line is drawn in *The Caledonian Railway Company v. Ogilvy* (2 H. L. C. 234; 2 Macq. 229)—viz., that it must be an injury in respect of which, if there was no enabling statute empowering the company to do the act, an action would have lain for the injury at common law. A house and premises, of which the claimant was lessee, and which adjoined the railway of defendants, were injured by the vibration caused by ballast waggons during the construction of the line, and by the passing of trains after the completion of the line, and the privacy of the premises was destroyed by being overlooked from an embankment on which the line of railway passed. A warrant issued to the sheriff to assess the damages to which the claimant was entitled “in respect of the said lands or property, or his interest therein, having been so injuriously affected.” The under-sheriff directed the jury that both these matters were subjects for compensation, and the jury found that the claimant had sustained damage to the amount of 100 guineas: Held, that the premises were not “injuriously affected” within sec. 68 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vic. c. 18), by being overlooked; and that the inquisition being bad as to part, the court were bound to issue a certiorari to quash it. *Semble*, held also, that under sec. 68, compensation for injury caused by vibration must be confined to vibration in the construction of the works, and could not be claimed for what arose from the use of the railway after its completion. *Re Penny and the South-Eastern Railway Company*, 3 Jur. N. S. 957.

SETTLEMENT.—Portions—Younger children—Eldest son—Disentailing deed—Resettlement of estate—Younger son becoming eldest.—Where the bulk of an estate is limited in strict settlement, and by the same settlement portions are provided for younger children, no child taking the bulk of the estate by virtue of the limitations in strict settlement can take

any benefit from the portions, whether the settlement does or does not contain an express provision to exclude him from a share in the portions. But where a younger child becomes the eldest without taking any part of the estate, whether or not he is entitled to share in the portions, is a question of intention. The bulk of certain real estate having been settled in strict settlement, and a term having been limited to trustees upon trust to raise portions for younger children, with a provision that if a younger son should become an eldest son, his portion should accrue to the survivors—one son became of full age, and joined the tenant for life in disentailing and re-settling the estate, and died, leaving the tenant for life: Held, that the second son, who became the eldest son during the life of the tenant for life, but was prevented by the disentailing deed from taking the settled estate under the settlement, was not excluded from a share in the portions. *Spencer v. Spencer*, 8 Sim. 87, is in conflict with *Peacock v. Pares*, 2 Keen, 689, and it is to be followed in preference. *Macoubrey v. Jones*, 2 Kay & J. 684.

SHIPPING.—*Shipowner and master — Principal and agent — Contract by master — Authority.*—The broad question raised in the following case was whether, if the commander of a ship spends his owner's money improperly, and has no money to repair the ship or to purchase the cargo, and borrows money for the purpose, the owners are or are not liable. It may be stated in reference to this question, that if the owners of a ship receive goods bought with the moneys of another person through an unauthorised contract by the captain of the ship, and it appears from the evidence that, but for that unauthorised contract, there could have been no goods at all, or that a certain part of the goods could not have been purchased, but that the ship must have returned empty, none of the authorities justify the proposition that either the captain of the ship or the person from whom he borrowed the money should have no remedy whatever against the produce of the cargo purchased under such circumstances. Even if it is assumed that the transaction was without the owners' knowledge, yet, if it be shown to have been intended for their benefit, and that they could not have had the cargo without such person's money, they must be liable for the advance. B., the master of a ship, being on a foreign station, was intrusted by A. with a sum of money to complete a purchase, which afterwards went off. B. thereupon expended part of the money in purchases of merchandise on behalf of the owners of the ship, and part in repairs. In order to reimburse A., B. drew a bill upon the owners for the amount deposited with him, and sent it to A., together with a bill of lading, by way of collateral security. The bill of exchange, upon

being presented for acceptance by A., was dishonoured, and the bill of lading repudiated by the owners of the ship, it being alleged that B. had cash and merchandise enough on board to bring home the ship and a cargo without borrowing money. A bill was filed by A. against the owners, praying for payment by them, or in default of payment for a declaration that he was entitled to a lien on the part of the cargo comprised in the bill of lading. At the hearing of the cause, inquiries were directed as to whether the whole, or any and what part of the money was applied to or for the use and benefit of the defendants, the owners: Held, that as the defendants, the owners, had had the benefit of the plaintiff's money (though upon an unauthorised contract), the plaintiff was entitled to a decree with costs. Want of authority for the contract was not a reason why the owners should have the benefit of the contract which was made without their authority. If the conduct of the master had been proved by the owners to be fraudulent, and his representations untrue, whether, in such a case, a person in the position of the plaintiff ought to bear the loss arising from the misconduct of the master, who was an agent of the owners, *quære*. *Ashmall v. Wood*, 30 Law Tim. Rep. 20.

SURETY [*ante*, pp. 54, 118].—*Giving time to principal without consideration* [vol. 2, pp. 307, 344; *ante* p. 123].—It is not every alteration of position that authorises a surety to come into equity and claim to be discharged from his liability. Equity will not interfere unless the creditor has in some way altered the position of the surety with reference to his remedies against the principal debtor. Where a creditor, knowing that the surety was in treaty with a third party for an arrangement under which the principal debtor was to relieve him from his suretyship, made to the principal a promise for giving time, which was without consideration, and not binding, and the surety thereupon discontinued his treaty with the third party: Held, that the creditor did not thereby lose his remedy against the surety. *Tucker v. Laing*, 2 Kay & J. 745.

TRADE MARKS [vol. 3, p. 126].—*Injunction—Piracy of trade mark—Fraud.*—We have before noticed the subject of trade marks (vol. 3, p. 126), and we may now add that the remedy in cases of taking another person's trade mark is founded on the fraud committed by the person so using it, thereby falsely representing that the article on which the trade mark is placed has been made by the person whose trade mark is used. *There is no property in a trade mark*, but a person may acquire such a right in respect to it as to say, that nobody else shall use it. A's trade mark placed on goods, is an announcement to all the world that the goods

are made by A. No man has a right to state a falsehood, and commit a fraud; therefore, nobody but A. has a right to make that representation. If A. has, by the use of a particular mark on goods, fixed in the minds of the customers in any market the opinion that goods so marked are of A.'s manufacture, nobody but A. has a right to use that mark, and palm off a surreptitious article [upon a purchaser. And so it is put by Lord Hardwicke in *Blanchard v. Hill* (2 Atk. 485), which was a suit for an injunction to restrain the defendant from using the mark of the Great Mogul, which the plaintiff alleged to be his own mark, granted to him by the Cardmakers' Company, under their charter. Lord Hardwicke refused the injunction on several grounds, stating, among others, that it was not the single act by the defendant of using the same mark that would entitle the plaintiff to a remedy; but doing it with a fraudulent design to put off inferior goods by this means, or to draw away customers from the plaintiff. These remarks will explain the following decision, it being borne in mind that the principle applicable thereto is, as above stated, that a man has no property in a trade mark, but he has a right to prevent anybody else from using it so as to attract custom, which otherwise would flow to himself:—C., the plaintiff, an alien *ami*, manufactured, in his own country, certain goods, which he distinguished by a peculiar trade mark. The goods obtained considerable reputation, both in his own country and in various other foreign countries, and also in some British colonies, but it was not shown that any of such goods had ever been even introduced or imported into England. The defendants were in the habit of manufacturing in and selling in this country goods similar in appearance, and with an exact copy of the plaintiff's peculiar trade mark. Some of these imitative articles were sold, and used abroad in countries where the plaintiff's goods had obtained a reputation: Held, that the plaintiff was entitled to an injunction restraining the defendants from copying or imitating the trade mark. *The Collins Company v. Brown*, 3 Jur. N. S. 929.

TRUSTEE AND CESTUI QUE TRUST.—*Breach of trust—Duty of trustee* [vol. 2, pp. 810, 870].—The cases of the liabilities of trustees newly appointed, for the continuance of the improper investments of their predecessors, deserve especial notice. In the case of *Dix v. Burford* (19 Beav. 409), the trust-funds devolved upon a trustee who was in an infirm condition, and the negligence consisted in the trustee not doing that which the testator himself had not done. The Master of the Rolls held, that the trustee was guilty of a neglect of duty. He said, "the moment Yells accepted the trust it became his duty to take proper steps to prevent his co-trustee

alone receiving the money." In the following case it appeared that in 1847 C. obtained a judgment against S. This judgment was not registered by C. Upon the marriage of C.'s daughter, in 1849, this judgment, along with other moneys, was assigned to H., upon the trusts of the settlement. H. took no steps to complete the registry, and subsequent incumbrances of S. obtained priority over it. It appeared that the attention of the trustee had been called to the position of the trust-fund. The judgment was not finally registered until the year 1854. The lands of S. were subsequently sold, but the fund did not reach C.'s judgment, and the only remaining property of S. was a life estate of little value: Held, that H. was liable for the amount of the judgment. *Lester v. Lester*, 30 Law Tim. Rep. 23.

EQUITY PRACTICE.

BILL.—*Written bill—Printed bill not filed in time* [vol. 2, p. 344; 3 Id. 191].—A written bill had been taken off the file in consequence of the printed bill not having been filed in due time: this was proved to have been caused by a mere slip. Ordered that the written bill should be restored to the file, and that a printed copy should be received and filed as of the day on which the print ought to have been filed; and that, notwithstanding the General Order of 7th August, 1852, no costs should be taxed and paid to the defendants by reason of the print not having been actually filed on that day. *Ferrand v. Corporation of Bradford*, 21 Beav. 422.

COSTS.—*Amended bill—Evidence on matters struck out.*—Where a charge against a defendant is struck out by amendment, the defendant is not justified in entering into evidence on the subject; and will be liable for the costs occasioned by such evidence being entered into. *Stewart v. Stewart*, 22 Beav. 393.

COSTS.—*Fund standing to separate account—Costs not taxed; lumping sum allowed.*—The Master of the Rolls, on a petition for transfer out of court of a fund standing to the separate account of the petitioner, no other person being interested, does not order taxation of the costs, but allows £10 for costs without taxation. *Gower v. Stitwell*, 21 Beav. 182.

COSTS.—*Application to Parliament.*—Where an application to Parliament is sanctioned by the court the costs of it will be allowed, although the application fails. *Re The Bedford Charity*, 26 Law Journ. Ch. 613.

DISMISSAL OF BILL [ante, p. 47; vol. 3, pp. 45, 127, 398].—*115th Order of May, 1845—Dismissal of bill for want of prosecution—One of several defendants not required to answer amendments.*—Where one of several defendants is not required to answer to an amended bill, he is not entitled,

under the 115th Order of May, 1845, to move, at the expiration of fourteen days, to dismiss for want of prosecution, when a co-defendant is required to answer. *Brown v. Butler*, 21 Beav. 615.

EVIDENCE.—*Special examiner* [vol. 2, p. 223].—*Fees.*—The allowance to a special examiner is five guineas a day, and to his clerk five shillings a day. The length of the meeting makes no difference; the examiner is bound to give the whole of a legal day. No fee is allowed for a preliminary perusal of the papers in the cause. *Payne v. Little*, 21 Beav. 65.

EVIDENCE OF DEATH.—*Recital in private act of Parliament.*—As stated in the "First Book," p. 25, a mere recital in a statute is not conclusive. In the following case, the Master of the Rolls held that a recital of a death contained in a private act of Parliament sixteen years old not to be sufficient evidence of the death. *Cowell v. Chambers*, 21 Beav. 619.

EVIDENCE.—*Vivâ voce examination—Accounts—Producing documents* [vol. 3, p. 258].—A defendant having brought in and vouched his accounts may be examined *vivâ voce* thereupon, and may be required to produce documents; but notice must be given of the points on which it is desired to examine him. *Wormsley v. Sturt*, 22 Beav. 398.

INJUNCTION [vol. 3, p. 191].—*Service of notice of motion—Leave for, before bill filed.*—Application for leave to serve a notice of motion for an injunction before bill filed refused, but leave given to serve notice, with copy of bill. *Simmons v. Heaviside*, 22 Beav. 412.

MORTGAGE.—*Administration—Costs of suits* [ante, p. 47; vol. 3, p. 398].—The following case may be considered as illustrating our remarks in vol. 3, p. 398. In a suit for administration, all proper and necessary parties are paid their costs in the first instance, and before the fund is administered. But in a suit by a mortgagee, or for the benefit of mortgagees, to ascertain priorities upon an estate, or upon a fund which is the produce of the estate (after payment of such costs as may be proper to the plaintiff in the first instance, where all persons obtain the benefit of the suit), the costs of the mortgagees are added to their mortgage securities. *Ford v. Earl of Chesterfield*, 21 Beav. 426.

PRODUCTION OF DOCUMENTS [ante, pp. 47, 48, 119; vol. 2, p. 373; vol. 3, pp. 35, 398].—*Court rolls of manor.*—Under an order for production of documents, court rolls of a manor (as a merchant's account books) are merely to be produced for inspection, and not to be deposited in the court. *Carew v. Davis*, 21 Beav. 213.

PUBLIC COMPANY.—*Winding-up acts—Interlocutory inquiries—Costs.*—If the right to an order

to wind up a company is established, the costs of intervening proceedings arising out of an opposition to the order must be borne by the respondents. *Re The Bosworthon Mining Company*, 26 Law Journ. Ch. 612.

SOLICITOR AND CLIENT [ante, p. 89].—*Taxation—Costs—Bankruptcy—More than a sixth off* [vol. 3, p. 58].—The assignees in bankruptcy of a solicitor, whose bill has been referred for taxation on the application of the client, must pay to the client the costs of the reference where more than one-sixth has been taken off the bill. *Re Peers*, 21 Beav. 520.

SOLICITOR AND CLIENT.—*Balance of trust fund not ordered to be paid to cestuis que trust—Breach of trust.*—On ordering taxation of a bill of costs in respect of a trust estate, the court will not direct any money found due from the solicitor to be paid to the cestuis que trust, for the solicitor would have no indemnity against a breach of trust. *Re Hallett*, 21 Beav. 250.

SOLICITOR AND CLIENT.—*Taxation—Costs—Neglect to deliver bill—Extension of time.*—A solicitor being ordered to deliver his bill within fourteen days, and on his failing to do so, a motion being made for the second order, and the solicitor being allowed further time: Held, that he must pay the costs of the motion. *Re Dendy*, 21 Beav. 565.

SOLICITOR AND CLIENT [vol. 3, pp. 219, 298].—*Taxation—Several bills, order to tax some only of them.*—A solicitor claimed five bills of costs: Held, that an order of course obtained by the client for taxation of two of the bills was irregular. *In re Law and Gould*, 21 Beav. 481.

STAYING PROCEEDINGS.—*Concurrent suits—Consolidating—Transferring.*—Where two suits are instituted for the same object in different courts, the parties ought to apply to the Lord Chancellor to have them transferred to one court. If they do not, the court itself will make the application. *Swale v. Swale*, 22 Beav. 401.

COMMON LAW.

BILL OF EXCHANGE.—*Surety—Giving time Release of acceptor who is surety* [ante, p. 123].—The holder of a bill had notice that the acceptor was surety for the drawer. By giving time to the drawer, he was held to have released the acceptor in equity, if not at law. The acceptor is not bound to use the giving of time as a defence at law; but may, at the risk of costs, defend the action on other grounds, and then resort to equity for an injunction. *Davies v. Stainbank*, 6 De G. Mac. and Gor. 679.

CONSIDERATION.—*Promise not to sue debtor—Nudum pactum.*—A promise, without consideration, not to sue a principal debtor is binding neither at law nor in equity. Where, for instance, a credi-

tor promises to give time on the terms of the debtor paying off an arrear of interest, and paying the interest regularly in future, *nothing* being thus stipulated to be done by the debtor which he was not already bound to do, there is no consideration for the promise; it is not binding; and the court will not restrain the creditor from suing at law. *Tucker v. Laing*, 2 Kay & J. 745.

FEME COVERT.—*Bill of exchange drawn in favour of* [ante, p. 113]—*Separate estate*—*Notice*.—As stated ante, p. 113, the fact of a bill of exchange being drawn in favour of a married woman is notice that it is in respect of her separate estate. And, therefore, where a bill of exchange was drawn in favour of a married woman, and her husband, by forging her indorsement, got it discounted, it was held that no interest in the bill passed to the holder. *Dawson v. Prince*, 30 Law Tim. Rep. 60.

GOODS SOLD ON CREDIT.—*Principal and agent*—*Third person*—*Course of dealing*—*Authority to order goods*—*Master and servant*—*Supplying servant with goods on credit*.—In former times it was laid down that if there was one instance of a servant dealing on credit, with the sanction of his master, that was evidence of a general authority to deal on credit until the authority was withdrawn. In the following case it appeared that the course of dealing for eight years between plaintiff and defendant, who was a jeweller, had been for plaintiff to receive orders from A., the managing shopman of defendant, at the shop, for goods to be sent to the shop. A. having absconded, and obtained goods from the plaintiff in defendant's name, for which plaintiff brought an action against defendant: Held, that there was evidence of A. being general agent of defendant to conduct the business of his shop, and having general authority to order goods. *Summers v. Solomon*, 3 Jur. N. S. 962.

LIBEL.—*Privileged communication* [vol. 3, pp. 303, 400]—*Family matters*.—The following decision as to what is a privileged communication by one member of a family to another, respecting the character of a party who was about to marry into the family, was decided on the authority of *Todd v. Hawkins* (2 Mood. and Rob. 20). The plaintiff, being about to marry one E. D., the defendant (who was a cousin of E. D.'s) wrote a letter to G. (who was sister-in-law to E. D.), stating that she had heard from L. (who was a cousin both of the defendant and also of E. D.) certain injurious statements reflecting on the character of the plaintiff, and requesting that the statements might be communicated to F. (who was a brother of E. D.'s), or to E. D. herself, in order that inquiries might be made: Held, that such was a privileged communication: Held, also, that the question of imprudence, like the

question of excess, might be left to the jury, from which to infer *mala fides*. *Atkinson v. Congreve*, 80 Law Tim Rep. 12.

NEGLIGENCE [vol. 3, p. 322].—*Collision at sea*—*Transport*—*Order of superior officer*—*Ship under orders of Government*.—No action can be maintained against the owners of a transport vessel, employed by the Government, for damage done in the execution of positive orders of an officer of the Royal Navy, under whose command she was. Mr. Justice Willes conceived that this immunity does not depend upon martial law, but on the ground that persons acting under such orders cannot be said to be guilty of negligence. Where a vessel of the Royal Navy, towing two transports, anchored by order of the Admiral, and the captain ordered the vessels in tow to hold on by their warps, and afterwards a breeze sprung up, and one of the transports, swinging to it, came into collision with another transport in another column, and the captain stated in evidence that after the order to hold on by the warps it would have been proper for the master of the transport to let go his anchor, if anything occurred which would have made it dangerous to his own or other ships, if he did not do so: Held, that, in an action against the owner of the transport for damage done by the collision, the judge was right in leaving it to the jury to say whether the master was not guilty of negligent seamanship in not dropping his anchor on the wind changing. *Hodgkinson v. Fernie*, 26 Law Journ., C. P., 217.

COMMON LAW PRACTICE.

CHARGING ORDER [vol. 2, pp. 75—78, 324].—*Conditional order*—*Common Law Procedure Act*.—The following Irish case upon the important subject of charging orders is deserving of attention, especially in connection with what is stated in vol. 2, pp. 75, 78; and vol. 3, pp. 141, 180. The order made by a court of law under ss. 132—135 of the Common Law Procedure Amendment Act (Ireland), 1853, to attach stock standing to the credit of a debtor in a cause in the Court of Chancery does not *per se* operate as a seizure of or a charge on the stock. *Semble*, the lodging of such an order with the Accountant-General without obtaining an order of the Court of Chancery does not charge the stock. *Semble*, also, that a conditional order does not attach the fund, under the Common Law Procedure Act. A conditional order to charge funds in Chancery was obtained under the Common Law Procedure Act on the 30th of June, made absolute on the 8th of August, and lodged with the Accountant-General on the 14th of November. A conditional order to charge the same fund was obtained in Chancery by another creditor, under 3 & 4 Vic. c. 105, on the 1st

of August, lodged with the Accountant-General on the 7th of August, and made absolute on the 13th of November: Held, that the creditor who had obtained the order in Chancery was entitled to the fund in priority to the other creditor. *French v. Balfe*, 6 Ir. Ch. Rep. 63.

BANKRUPTCY.

CERTIFICATE [*ante*, p. 96].—*Unauthorised dealing with customer's money, and with securities held as director or as broker.*—The following is one of the numerous cases of appeal respecting the grant of a bankrupt's certificate. A broker, who was a director of and broker to a company, which had been ordered to be wound up, received at a time when he was insolvent an order from a customer directed to him, and to a partner who he knew or believed to be dead, to buy a sum of Sardinian stock. The broker contracted with L. for the stock, and received the price from the customer as for himself and his deceased partner. He did not pay L. for the stock, but allowed him interest for three months, and applied the money to his own purposes. Immediately before his adjudication of bankruptcy he sold a debenture of the company to A. for the amount due upon it, without requiring any money for the four years' interest which was also due, and with the money paid L. part of the money the price of the stock, and gave him a bill for the remainder, and L. then transferred the stock to the customer. The broker had previously privately appropriated this debenture to the safety of the customer, and when he sold it had no authority from the customer for so doing. The broker became bankrupt upon a trader debtor summons, issued by the official manager of the company, and received from one of the commissioners a first-class certificate, with protection; but, upon appeal, the Lords Justices, for the above and other misconduct, discharged the order and suspended the certificate for five years, without protection for seven weeks, both from the date of the judgment. *Exp. Wryghte, re Mark Boyd*, 26 Law Journ., Bank. 33.

CERTIFICATE [*ante*, p. 96].—*Falsification of books—Refusal of certificate.*—One of the commissioners had refused a bankrupt any certificate or protection on three grounds: reckless trading, fraudulent incurring of debts, and falsification of books. On appeal, the court confirmed the refusal of the certificate, upon the latter ground alone, without giving any judgment on the other two; but granted protection, if the unconditional consent of the opposing creditors were given. *Exp. Knight, re Knight*, 26 Law Journ., Bank. 57.

EXECUTION [vol. 3, pp. 227, 308].—*Certificate B. a.* [*ante*, p. 126; vol. 3, pp. 186, 228].—*Refusal*

of protection, what.—By sec. 257 of the Bankruptcy Consolidation Act, the court, after refusing protection to the bankrupt, may grant a certificate in the form in the Schedule B. a., which shall have the effect of a judgment until the grant of the bankrupt's certificate; and the assignees or the creditor to whom, according to such certificate, the bankrupt shall be indebted as therein mentioned, may thereupon issue and enforce an execution against the body of such bankrupt. In the following case, it appeared that the bankrupt's last examination was adjourned *sine die*, with protection for two months: Held, that it was, by necessary implication, a refusal of protection after that time, and that the bankrupt not having applied to have his protection renewed, the court must grant the certificate B. a. to a creditor who had proved his debt. *Ex parte Scarth, re Rochefort*, 30 Law Tim. Rep. 12.

PUBLIC COMPANY [*ante*, p. 117].—*Winding-up limited company* [see vol. 3, pp. 176, 177].—*Dissentient shareholders—Adjournment of petition—Injunction—Receiver.*—The following case arises on the Winding-up Clauses of the Joint-Stock Limited Liability Act, 1856 (see 3 Law Chron. pp. 176, 177). If a petition be presented by a director of a company for the purpose of having it wound up in bankruptcy under the Joint-Stock Companies Act, 1856, and in opposition to the wishes of a large body of shareholders who have in vain applied for an opportunity of investigating the accounts, the court will adjourn the hearing of such petition to enable such shareholders to investigate the matters alleged in the petition, and the actual state of the company's affairs, with a view of coming to an arrangement with the creditors, and so prevent the necessity of winding up the company; and will in the mean time, under sec. 84, restrain actions brought by various creditors against the company, and appoint a receiver of the estate and effects of the company. A shareholder in a company registered as "limited," who has paid up the full amount of his shares, is a "contributory" within the definition contained in sec. 65 of the Act, and has an interest in the estate and affairs of the company sufficient to entitle him to present a petition for winding it up. *Ex parte Jones, re The Royal Surrey Gardens Company (Limited)*, 30 Law Tim. Rep. 11.

PUBLIC COMPANY.—*Limited company, winding up* [*ante*, pp. 97, 98].—*Joint-Stock Companies Act, 1856—Petition by contributory—Voluntary winding up—Jurisdiction of court to make winding-up order after special resolution to wind up, and liquidator appointed—Charges of misconduct, how made—Amendment of petition—Absent members, with notice bound by acts done at general meetings.*—Section 69 of the Joint-Stock Companies Act, 1856, enacts, that "any ap-

plication to wind up a company shall be by petition, to be presented by a creditor or a contributory," in certain cases. By sec. 102, the circumstances are stated under which a company may be wound up voluntarily—that is, "whenever the company, in general meeting, has passed a special resolution for that purpose." By sec. 34 a special resolution is defined, and it is required to be confirmed by a majority of the shareholders present at a subsequent meeting, held at an interval of not less than a month from the date of the first meeting, and of which notice has been duly given. Such resolution, when so confirmed, becomes absolutely binding on the whole body of shareholders of the company. The consequences of a voluntary winding up are that the shareholders themselves appoint the liquidator, who, by article 7 in sec. 104, is to have all the powers thereinbefore vested in official liquidators, and which he may exercise without the intervention of the court. Then, in order to protect the creditors, who have no right to attend the meetings, it is provided, by sec. 105, that the voluntary winding up of a company shall not prejudice the right of any creditor to institute proceedings for the purpose of having the same wound up by the court. But the act contains no analogous clause to protect the interests of contributories. The powers of the official liquidator are defined by sec. 90, which also applies to the liquidator appointed under a voluntary winding up. Section 19 of the Joint-Stock Companies Act, 1857 (20 & 21 Vic. c. 14), enacts, that "where a company is in course of being wound up voluntarily, and proceedings are taken for the purpose of having the same wound up by the court, the court may, if it thinks fit, notwithstanding that it makes an order directing the company to be wound up by the court, provide, in such order, or in any other order for the adoption of all or any other of the proceedings taken in the course of the voluntary winding up; it may also, instead of making an order that the company should be altogether wound up by the court, direct that the voluntary winding up should continue, but subject to such supervision of, and with such liberty for creditors, contributories, or others to apply to the court, and generally upon such terms, and subject to such conditions as the court thinks just." This 19th sec. intended to remedy the inconvenience or injury that arose under the provisions of the act of 1856, by the Court of Bankruptcy stepping in when the company was all but wound up voluntarily, and undoing all that had been done. A shareholder and contributory in a joint-stock company is entitled to present a petition for an order to wind it up in bankruptcy, notwithstanding he attended a special meeting, and took part in a special resolution for winding up the company voluntarily,

and for the appointment of a liquidator for that purpose, such special resolution not having been confirmed as required by sec. 34 of the Joint-Stock Companies Act, 1856, until the day after the petition had been presented. The jurisdiction of the court in such a case is not ousted by the circumstance of such special resolution having been passed, unless confirmed before the petition was presented, although the liquidator appointed by the shareholders is proceeding with the winding up. In a petition presented by a contributory for a winding-up order, if it be intended to charge the directors directly with fraud, some notice of the proposed charges should be introduced into the petition in an intelligible form, so that the directors may know what they have to answer. The simple statement in the petition that the petitioner was dissatisfied with their conduct, is insufficient to justify charges of particular misconduct; but under the particular circumstances of the case, leave was given to amend the petition. If notice of a general meeting of a company be properly given to the shareholders, and the meeting be duly advertised as required by the act, the resolution of the majority of the shareholders attending such meeting, however small in number, will bind the company, and the number of shareholders attending the meeting is immaterial. *Exp. Daniell, re The London and West of Ireland Fishing and Fish Manure Company*, 30 Law Tim. Rep. 66.

CRIMINAL LAW.

PAUPER.—*Order of removal—Appeal* [vol. 3, pp. 232, 382].—*Next practicable sessions—Depositions—Mandamus.*—In *Reg. v. The Justices of Surrey* (2 New Sess. Cas. 155), Wightman, J., said (p. 159), "As a reasonable time must be given to the appellant parish to determine whether they will appeal or not, and due notice of the grounds of appeal must be given to the respondent parish, it might be impossible to appeal to the very next sessions consistently with those preliminary conditions, and it has therefore been determined that the term 'next sessions' means the next *practicable sessions*—that is, the next sessions that are consistent in point of time with enabling the appellants to make due inquiry and give the requisite notices." In the following case, it appeared that an order of removal was made on the 6th September, and served on the 10th. On the 20th the clerk to the appellants sent a letter to the respondents, stating that the pauper was settled in P., and adding, "I shall on these grounds appeal against your order." On the 26th September the appellants applied for the depositions, which were received on the 30th. On the 7th October, the appellants gave a formal notice of appeal for the "next quarter sessions." At the sessions on th

16th October the appellants did not enter and respite the appeal, and the respondents applied for costs, which were refused. On the 20th October, the respondents removed the pauper. On the 23rd December, a fresh notice of appeal and grounds were served for the Epiphany Sessions. At these sessions the justices refused to hear the appeal. On application for a mandamus to the justices to hear the appeal: Held, that the appellants ought to have entered and respited the appeal at the October sessions, which were the next practicable sessions; and the mandamus was refused. *Reg. v. The Justices of Peterborough*, 3 Jur. N. S. 887.

DEBATING SOCIETIES.

THE BIRMINGHAM LAW STUDENTS' SOCIETY.

October 14, 1857.—*Moot Point, No. 233.*

A sheriff's officer, by virtue of a writ of *capias*, breaks open a defendant's house, and arrests the defendant. Is such arrest valid?

Taking the leading case on this subject, *Semayne's case*, reported in Vol. I. of Smith's leading cases. The first resolution is thus stated—that the house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose. The third resolution: In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him or to do other execution of the King's process, if otherwise he cannot enter; but before he breaks it he ought to signify the cause of his coming, and to make request to open the doors. The fourth resolution: In all cases when the door is open, the sheriff may enter the house, and do execution at the suit of any subject, either of the body or of the goods; and so may the lord in such case enter the house and distrain for his rent or service. The case itself finally resolved: That it is not lawful for the sheriff, on request made, and denial, at the suit of a common person, to break the defendant's house to execute any process at the suit of any subject, and for the reasons therein fully stated.

That "every man's house is his castle" is a maxim well understood when individually applied or viewed in relation to the political rights of Englishmen; but this privilege is after all a limited one, and limited during such time only as no criminal offence is offered to the State, and his citizenship continues unimpaired.

The question on the moot point was raised from a consideration of the cases on the subject, which point to a distinction between the case of an illegal

entry by the sheriff for the purpose of levying a writ of *fi. fa.*; and the situation of the sheriff under similar circumstances, seeking to arrest the defendant on a *ca. sa.* In the former case, it is said, that the sheriff breaking an outer door to do execution is a trespasser by the breaking, and yet the execution which he then doeth in the house is good. This we have on the authority of the Year Book of 18 Ed. 4; Pasch. 4; Bacon's Abridgment Execution (N.); *Goudonin v. Lewis*, 10 A. and E. 120; *Percival v. Stamp*, 23 L. J. R., Ex., 26 (but see *Yates v. Delamayne*, Trin. Term, 17 Geo. 3, where an execution against the goods was set aside on the ground that the outer door had been illegally broken open). The negative of the moot point is supported by *Hodgson v. Tanning*, W. W. and D. 53; *Kerbey v. Denbey*, 1 M. and W. 336, which rendered the sheriff, not only liable in trespass for the illegal entry, but also in damages for the assault on defendant; and see also *Hunland's Case* (Dyer, 185), *Robinson v. Yewens* (5 Ex.), and *Barratt v. Price* (9 Bing. 566), and the elaborate review of the authorities by the several judges in the recent case of *Cooper v. Lane*, on appeal to the House of Lords.

By the affirmative it was contended that the law must be the same, whether goods are seized under a *fi. fa.*, or the debtor under a *ca. sa.*, relying on a dictum of Bramwell, B., who says: "If the seizure of goods be lawful after an illegal entry by the sheriff, why not the body?" It was also submitted that the privilege involved in the maxim referred to was merely intended to shelter the individual from violence and oppression from without, and was never intended to shield him from the just demands of his creditors, and when confirmed by process in the hands of the sheriff; and that the continuance of such a rule is a breach of justice to the creditor, an incentive to dishonesty on the part of the debtor, and totally inconsistent with the views expressed by several eminent judges. It was replied in the negative, that the distinction in principle between a seizure of goods and that of the person is at once obvious: as in the former case no personal injury is inflicted, while in the latter case the defendant is deprived of his liberty guaranteed by the law when in his domestic sanctuary; that in the case of an execution against goods there is no analogous injury, and therefore, to establish a new principle when no authority can be found to support it, would be, indeed, arbitrary; and that, supposing the principle extended, collusion between the execution creditor and sheriff would follow for the purpose of malicious arrests, and thereby produce gross irregularities in the execution of writs.

The meeting was unanimous in the negative.

A. FEREDAY, Corresponding Secretary.

GENERAL MEETING OF THE LAW STUDENTS'
MUTUAL CORRESPONDING SOCIETY.

"Union is Strength."

Dear Sir,—The following plan, which I beg to submit for your consideration, is by no means a novel one, and its principle must have struck many of the members besides myself; indeed, it is the obviousness of the want which has led me to take the matter in hand, and to hope for the support of the members in it.

The scheme which is at present proposed, though necessarily far from perfect in detail, is, that a meeting shall be held at Birmingham, early in the month of December next; that there shall be a dinner, for which the tickets shall be 10s. 6d., including wine and dessert, at which our indefatigable secretary, Mr. Gilman, has consented to preside; and that all solicitors and articled clerks, *whether members of the Society or not*, shall have the privilege of taking tickets; and that such meeting shall take place annually.

The Society has heretofore consisted rather of several separate societies in the form of sections than of one united body, and the object of these meetings is *pre-eminently* to give the members an opportunity of becoming personally acquainted; of giving the society the benefit of suggestions for its improvement, which it would otherwise lose: and generally to hear and talk over the prospects and affairs of the Society.

At the present time, when the attention of the profession generally is drawn to the subject of "legal education," it behoves all law students (who are the persons most interested in the subject) to prove by their united action that they are fully alive to its importance, and to oppose any scheme which they may consider obnoxious to their interests, and it is confidently expected that at the proposed meeting this subject will have the earnest attention of all gentlemen present, and that measures will be taken to carry out the conclusions to which the meeting may arrive.

The details of the plan have necessarily been omitted, as they will depend in a great degree upon the suggestions which I hope to receive from the members on the subject, but the whole plan will be submitted to them in ample time to make their arrangements.

I have therefore earnestly to request that you will inform me at your earliest convenience, whether you will be able to attend the proposed meeting, or, if unable to do so, whether you will take a ticket for the purpose of supporting the project—a considerable outlay being necessary in carrying out the preliminaries.

Allow me to suggest that a meeting of all the articled clerks in your town be convened on the receipt of this circular, when the subject can be discussed, and an agreement made to form a party to attend the meeting.

I am, &c.,

ISAAC WALKER, *Prov. Hon. Sec.*

Burslem, Staffordshire, Oct. 10, 1857.

* * All communications to be addressed to ISAAC WALKER, Church-street, Burslem. A speedy answer is particularly requested.

ARTICLED CLERKS.

DUE SERVICE UNDER ARTICLES—QUALIFICATION
OF ARTICLED CLERKS.

The following was omitted from our last, and is a continuation of pp. xv, xvi:—

Sufficiency of service under articles.—The council have had under their consideration several questions from time to time on the mode and sufficiency of service of articles of clerkship, where the clerks have been engaged in other business than that of the attorneys to whom they are articled, such as agents to insurance companies, or holding appointments as coroners, clerks to magistrates or boards of guardians. These questions are properly within the province of the examiners, to whom the parties have been referred; and they have been reminded of the 12th section of the 6 & 7 Vic. c. 73, which enacts "that the clerk must, during the whole term of service, be actually employed by the attorney to whom he is articled in the proper business, practice, or employment of an attorney or solicitor."

Qualification of articled clerks.—Questions have also been raised regarding the qualification of articled clerks to be admitted on the roll of attorneys:—1st, whether a master of arts could be admitted, after three years' service, like a bachelor of arts or a bachelor of laws, under the 6 & 7 Vic. c. 73, s. 7. This point has been decided in the negative by a judge at chambers; 2nd, whether a gentleman in deacon's orders could be articled, examined, and admitted on the roll of attorneys and solicitors. There is no statute or decision expressly on the subject; but as deacons cannot be called to the bar, nor become proctors, the question will be submitted to the court when the candidate applies for examination and admission.

Pleadings—Admission by implication.—In *Cooke v. Blake* (1 Exch. 220), Parke, B., in delivering the judgment of the court (p. 237), said, "When, in a pleading, one of several material and traversable averments is denied, the others are admitted in that suit; and therefore, in a case in which it is averred that one was seised granted, the denial of the grant would seem to admit the seisin in fee."

DEBATING SOCIETIES.

THE BIRMINGHAM LAW STUDENTS' SOCIETY.

October 28, 1857.—*Moot Point, No. 234.*

Can a purchaser of an equity of redemption, paying off a first incumbrancer, keep the charge alive for his own benefit as a protection against subsequent incumbrances.

The principle involved in this point is of very extensive application, not only with regard to persons possessing limited interests in estates, but particularly as it affects the privities of different incumbrancers by way of mortgage. As the doctrine of merger is intimately blended with the question discussed, we may as well note its function in this instance, and nothing can be clearer than this—that when the purchaser of an estate discharges an incumbrance, the legal estate by which such charge is supported, becomes, in legal language, drowned in the absolute fee of the owner. This I take to be a leading element in the case: very well; then, what are the facts and cases viewed in connection with the moot point. In *Toulmin v. Steere* (3 Mer. 210), I find, where a purchaser of an equity of redemption pays off the first mortgage, and takes a reconveyance, that the debt so discharged will merge as against other incumbrances. So in *Parry v. Wright* (5 Russ. 142), where a third incumbrancer, having notice of the second mortgage, bought the estate, and the first mortgagee reconveyed to a trustee for the purchaser in fee, the second mortgagee was held to become the first incumbrancer. In the case of *Mocati v. Murgatroyd* (1 P. Wms. 892) the mortgagee of a ship had returned the bill of sale to the mortgagor, who was thereby enabled to re-mortgage different parts of the ship to other persons, and the first mortgagee acquiesced therein. He afterwards took a release of the equity of redemption. It was held that the subsequent mortgages should be preferred to his. See also *Grenvold v. Marsham* (2 Cha. Ca. 170); *Squire v. Ford* (9 Hare 47); *Otter v. Vaux* (25 L. J. R., C., 734); on appeal, 26 L. J. R., C., 128; and *Spence's Equity*, vol. 2.

These cases are direct authorities for showing that, where one purchases an equity of redemption, he cannot set up a prior mortgage of his own, nor, consequently, a mortgage which he has got in against subsequent incumbrances of which he has notice. The affirmative of the question was very ably argued and spoken of by several of the members with considerable ability, relying much on the apparent hardship it would inflict on an innocent purchaser if not allowed the benefit of keeping alive any charge he might choose to get rid of. Many cases were quoted, but they certainly did not reach the principle contended for by the affirmative. It

was held in one case, *Watt v. Symes* (21 L. J. R. C. 713), that a purchaser of an equity of redemption, who paid off first mortgage out of the purchase-money, might, having shown an intention of doing so (by a contract for that purpose), stand in the first mortgagee's place against the next incumbrancer; and the case of *Forbes v. Moffatt* (Tudor's Leading Cases, 763) was relied on. At any rate, the case now stands *in dubio*, and is open to a positive decision on the subject. The negative speakers argued thus—there is no hardship in the case, as the purchaser buys with his eyes open, with a knowledge of incumbrances; and if he discharges one, he must be presumed to know that he is clearing the estate, and making way for the next incumbrancer, who instantly becomes the first mortgagee. Again, whatever view equity may take as to the mortgage-money so paid off remaining a charge for the benefit of the purchaser, it is quite clear that at law the legal estate of the mortgagee is merged in the purchaser—*ergo*, how is the charge to be supported? And, again, it is well settled, that when a purchaser takes an estate, he accepts it subject to all the equities and conditions affecting such estate when in the hands of the vendor; and, in conclusion, that if the affirmative is correct, the owner of an estate might become his own mortgagee, which is a condition of things at variance with the common principles of reason, law, or equity.

The meeting decided in the negative.

November 11, 1857.—*Moot Point, No. 235.*

A mortgage deed contains an attornment of tenancy by the mortgagor to the mortgagee. Does this render the deed liable to a lease stamp?

When we consider the numerous instances of an attornment of the above nature, and the question as to the necessity of a lease stamp having been more than once raised, we are naturally led to investigate the reasons in favour of and against the proposition, in order, if possible, to extinguish our doubts on the subject. The first point that suggests itself to the mind is, whether a mortgage deed, containing an attornment of tenancy, is subservient or ancillary to the general intent and object of the deed; or whether, in the next place, the subject-matter of the attornment is distinct from, and inconsistent with, the main intention; but before we notice the arguments, let us take the rule upon this subject as laid down in *Phillips on Evidence*, p. 445: "If the interest of the parties relates to one thing which is the subject-matter of the instrument, or, in other words, if the instrument affects the separate interests of several, and there is a community of the same subject-matter as to all parties, there a single stamp will be sufficient; but where the parties have separate in-

terests in the subject-matters, there ought to be a separate stamp for each party."

For the affirmative it was argued, that the mortgagor being in contemplation of law tenant to the mortgagee, there is an absurdity in constituting the relation of landlord and tenant by an express clause to that effect; that the deed in such case has a double object, for it not only proposes to the mortgagee the repayment of his principal and interest, but it also creates a rent; that the attornment is in itself a re-demise to the mortgagor, and as a new estate at law, and springing from the mortgagee, requires a second stamp. It was also submitted, that where the object is ancillary to the general intent of the deed, that a second stamp is unnecessary. The case of *Walker v. Giles and Tort*, 18 L. J. R., C. P., 323, was discussed. In that case it was treated as doubtful, whether an agreement in the mortgage deed, that the mortgagor should be tenant at will to the mortgagee at a certain rent, with power of re-entry by the mortgagee, rendered a lease stamp requisite. It was not necessary to decide the question, as the deed was, as a mortgage, exempt from stamp duty under the Building Societies Act, and bore a £5 unappropriated stamp; but Maule, J., seemed to think, that the re-demise would only be a part of the security; and see *Doe v. Croft and Another v. Tidbury*, 23 L. J. R., C. P., 57.

In the negative it was contended, that the usual clause in a mortgage, giving to the mortgagor a power to hold possession until default in payment at the period stipulated, operates as a re-demise, and would, therefore, if the reasoning of the affirmative is correct, require a lease stamp as much as an attornment; indeed, more so, for if the mortgagor makes default, then he becomes a tenant at will, notwithstanding the attornment, and is liable to ejectment at any time—a state of things not very consistent with the nature of a lease, which involves a term certain, ascertained, and known. Again, the rent fixed by the attornment clause is intended as an additional guarantee for the due payment of the interest, the mortgagee then being, of course, in a position to distrain on non-payment thereof; and, by parity of reason, that the claim to a double stamp is about as logical as it would be to apply the same argument to the covenant to pay the principal and interest, or to contend that the receipt on the back of the mortgage requires a stamp. The scope and aim of the parties is the great consideration, and that is the security of the mortgagee; and the attornment clause is simply incidental to, and a portion of, that security. A deed of assignment of an attendant term for the mortgagee requires, of course, only a deed stamp, and no additional duty will be

payable if the assignment is contained in the mortgage deed; and here, it may be as well to observe, that if, on the sale of an estate, part or the whole of the purchase money is raised by loan, and the estate is conveyed to the lender subject to redemption by the purchaser, the *ad valorem* duty on sales to the full amount of the purchase money, and the *ad valorem* duty on mortgage to the amount of the sum borrowed, will be both payable; and Lord Denman, in *Hartwright v. Fereday*, 12 Ad. and E. 796, where a deed containing a transfer of stock and a release of lands was held not to require two stamps, observes, "We find no provision in the Act (speaking of the 55 Geo. 3), except in conveyances by way of sale, that when a deed operates on several subject-matters in several ways, it shall have several stamps; and, in the absence of any such provision, we think that one stamp is sufficient."

With the exception of *Walker v. Giles*, we have no direct case on the subject, and therefore the decision (which was in the affirmative) still leaves the question open for further discussion.

A. FEREDAY, Corresponding Secretary.

VENDORS AND PURCHASERS.

PUBLIC COMPANY.—*Agreement by [ante, p. 129]—Vendor and purchaser—Specific performance—Representations by agents of a public company—Duty of solicitors dealing with companies.*—The following propositions merit the serious attention of every practitioner who may have any transactions with public companies. The facts appear *ante*, p. 129. *Semble*, it is a breach of duty in a solicitor, for which he may justly be blamed, if in dealing with a public company he places the smallest reliance, on any representation of any agent of the company as to its future acts. A solicitor, dealing with a public company, ought never to be satisfied with anything than the most solemnly executed agreement of the company. The court cannot, when called on to decree specific performance of any agreement, direct any act to be done whereby the agreement itself, if not already legally binding, can be made so. Therefore, in a shockingly dishonest case, where an agreement had clearly been come to by a public company, but was not made out and executed in the statutory form (there being no agreement, signed by two directors, *ante*, p. 129), the court could not make the directors sign it, and dismissed the bill; although, if they had signed the agreement, specific performance would have been decreed. *The Leominster Canal Company v. The Shrewsbury and Hereford Railway Company*, 3 Jur. N. S. 931.

EDUCATION OF ARTICLED CLERKS.

If we may judge from the number of letters we have received, the intimation that the Council of the Incorporated Law Society have presented a memorial to the judges for the institution of an examination in languages, history, geography, arithmetic, and book-keeping, has created quite a ferment among articulated clerks—most unnecessarily, we think, as the supposition entertained that this will be extended to the clerks *now* under articles is *groundless*. Such an injustice is not likely to be perpetrated, and we, therefore, think it unnecessary to publish the communications we have received. Putting aside this groundless fear, what do the articulated clerks say to the proposition? To us, it appears to be intended as a measure of exclusion, and one, therefore, which must needs be beneficial to those who have been so fortunate as to be articulated prior to the institution of the examination. Is it, however, desirable to have a measure which will act as one of exclusion? Is it or not opposed to the spirit of the day, so far as regards throwing open employments to all ranks? or is it to be considered as a proper measure by which the status of the profession is to be raised in public estimation, and as in accordance with the cry of the day for competitive examinations? These and many other questions which the proposition gives rise to, will have hereafter to be considered. Another one of great importance will be the effect on the other branch of the profession—the barristers. Will not the distinctions now existing between the two branches of the profession gradually disappear, as solicitors are raised in intellectual position, and in the estimation of the world? The effect of the institution of the examinations has been very wonderful; the solicitors as a body are now very much superior to what they were twenty years ago, and will not the new measure have the effect of raising them still more? And will not that render the distinction between the barrister and the solicitor unnecessary; and is that a desirable consummation for either barrister or solicitor?

Putting aside, however, for the present the ulterior effects of the proposed plan, let us see what it is the Council of the Incorporated Law Society propose. The language of their report is as follows: "The Council some time ago received suggestions for extending the requirements at the examination of candidates for admission on the roll; and in their previous reports they stated the conclusions at which they had arrived—namely, to recommend to the judges to authorise an examination either before or during the articles of clerkship, or before admission, for the purpose of ascertaining that the candidates possessed an adequate knowledge of the Latin and

French languages, and of English history, geography, arithmetic, and book-keeping. A memorial to this effect has been prepared." The subject has been noticed by our contemporaries—the *Law Times* and the *Solicitors' Journal*—and we propose to state some of their views. One important point is, *when* should the intended examination take place: before or after the articles are executed? We have no hesitation in saying that it should be *before* the party is allowed to enter into the articles. The writer in the *Law Times* agrees in this, saying:—"We are wholly, and without reserve, as without misgiving, for an educational test, and that of a very stringent kind, for all who contemplate practising as attorneys and solicitors. But we deny that any such test, except of a very insufficient nature, can be employed properly except before service under articles begins to run. After that date, and up to the days of final professional examination and admission, the articulated clerk ought to give all the time that can be spared from necessary and reasonable relaxation to the exclusive study of the different branches of the profession which he proposes to practise. It would be monstrous and absurd—as a correspondent in our last week's impression (*Law Times*, p. 45) very sensibly shows—that, when a young man may fairly suppose that he has done with school and school studies, and when he has been devoting himself manfully for several years to far more arduous and pressing pursuits, he should be called on for the exhibition of accomplishments which the lapse of time, and a totally different course of discipline, must necessarily have clouded and lessened. Such a proposition is not only opposed to common sense, but to the latest philosophy of education as adopted at the universities, where, for several years, the principle has been recognised and practised that there are certain cycles of study, which are naturally consecutive and graduating upwards, but which, although strictly related to each other, are not to be treated as contemporaneous. Thus, at Oxford, under the new system, classics occupy an undergraduate in his first phase; histories in his second; science and divinity in his latest and consummate phase. Formerly all were mingled; and, at the end of three or four years, the strongest head, and the best *memoria technica*—which by no means included necessarily the subtlest or most versatile minds—gained the palm. It is this system, which our first universities have discarded on mature reflection, which we fear that the Incorporated Law Society seeks to introduce into the schools of the profession; and it is against this system that we feel bound to enter our protest.

"It must, therefore, be assumed, and held firmly, that a general education test can be applied properly and fairly only *before* the commencement of the law

students' articles. Let us start, therefore, with the assumption that there is, as undoubtedly there ought to be, a matriculation examination for articulated clerks, according to the analogy of that which is undergone by undergraduates at the best colleges of our universities, before their names can be entered on the college books. The next practical question is, what is to be the substance and style of such an examination?"

Then comes the question, are those persons who have not been blessed with a "classical" or even a good "commercial" education to be excluded from becoming solicitors? This is a point of some difficulty; but we rather incline to the opinion that if a test be imposed, all candidates should be subjected to it. The only real point with us is, should such an examination be instituted at all? if so, then, for the sake of the whole profession, let it be universal. The non-examined members would throw a taint on the whole, because it is impossible for the public to know whether or not any particular individual has undergone an examination. We find, however, that our views are not shared by others; thus the writer in the *Law Times* says:—"But we have to do with a second class, not less meritorious, and certainly not less able, although less favoured by early circumstances. This is that strong, sensible, energetic, and often consummately distinguished body who either enter the profession early in life without the advantages of 'regular' education, or work their way upwards into it late in life, sometimes—let it be spoken with all respect, honour, and admiration for them—from the desk of the copying clerk, or even from the lower drudgery of the office, to the point whence the favoured aristocracy of the profession starts. These are the privates and non-commissioned officers of the profession who claim to take rank and fight still upwards by the side of commissioned subalterns: and Heaven forbid that their claims should be either wholly denied or granted, except under proper conditions. The investigation in this case is one of a very delicate, and must, at times, be of a very painful kind. But the duty of the Incorporated Law Society is marked out clearly by the general sense of the profession. It is the chief and strict duty of the society to admit none, even to the probationary grade, unless he give satisfactory certificates that he possesses the essentials of ability, education, gentlemanly feeling, and character.

"In this case it is clear that it would be unjust and cruel to think of applying the test which has been recommended for the first class. What does the sharp copying clerk, who wins his articles by the respect and gratitude of his principal, know of 'Latin or French,' or even of 'English history and geography?' In 'arithmetic and book-keeping' he

would probably shoot far ahead of his aristocratic competitors at the matriculation examination: but unless he were to spend months, or even years, of the spare evenings of his adult life to pick up school-boy knowledge, he would be plucked to a dead certainty by a board of examiners. Yet already he is probably familiar with the practice of the courts; already he has dipped into text-books of principles; and perhaps for years he has worthily sustained, as managing clerk, the chief burden in his principal's office. Is he to be shut out from the higher walks of the profession for such flimsy deficiencies? Forbid it every power and principle of common sense; of common right and public interest. If such a principle were sound, it is probable that a good third of the most efficient and respectable members of the profession ought to be struck off the rolls at once for incompetency.

"What, then, is the education test in this case? Look at the class, and study the qualities which make it respectable and useful. Their principles and manners are often those of gentlemen: there is essential No. 1. Their intelligence, quickness, adaptability to all classes of business, and actual knowledge of law and practice, place their fitness for the higher branches of the profession beyond dispute. The prominence of these qualities is the index of the test sought. Analyse them, and they will be found to include, as actual acquirements, in addition to those already named—considerable knowledge of things, often of a scientific kind—of recent history, and actual political and social questions, with much fluency of speech—no small merit in every lawyer—and a very sufficient grammatical facility of composition.

"On all these matters, with arithmetic *ad libitum*, these gentlemen must be fully and strictly examined before they can be properly admitted to their articles. Mere book-knowledge, extrinsic to that of a professional kind, must not be expected from them; but a far more sufficient and comprehensive test may be fitly and stringently applied. This is the English essay, which, after all, we affirm to be the best and fundamental test of general fitness in every case, and in both classes. We affirm confidently, and without reserve, that a man who can write a grammatical, sensible, clear, and concise essay of his own genuine and original composition, on any ordinary subject of political, philosophical, literary, or legal interest, in a fluent and legible hand, may be passed safely through the foremost barrier of the profession as sufficiently 'educated'; although he do not know the Greek characters, and cannot construe a sentence in a Latin delectus or in a French primer; although his knowledge of history be confined to the general events of the reign of Queen Victoria; and his views

of geography be limited to obscure impressions that the face of the earth has been divided, rather arbitrarily, into four quarters. His future clients may laugh at his ignorance, but will not be worse served for it."

In a subsequent article, it is said:—"But there still remains a question on which we cannot come to so clear and decided an opinion: indeed, we are in doubt how to deal with it. There is a class of men who have by long years of industry qualified themselves for the profession, save by the possession of the preliminary knowledge to be required. They have otherwise given the pledges of character, which that preliminary test was designed to secure. It is hard, almost to injustice, that they should be forbidden the prizes they have won. We admit that these are exceptional cases. The majority of those who so enter the profession have not obtained it by any other merit than working gratuitously for a master too poor or too avaricious to pay them cash, and who so supports his office at the cost of his profession. An indiscriminate admission would be worse than an indiscriminate rejection.

"But may not such meritorious cases be treated as exceptions? Why should not a power be vested in some authority—the judges, or the Incorporated Law Society—to dispense with the preliminary examination, on being satisfied that in all other respects, especially in character for honour and honesty, the candidate is unimpeachable? Let not this be a matter of course, but a great favour conferred only after rigid inquiry and upon the best evidence."

The *Solicitors' Journal* considers the subject of legal education in a much wider view than the mere examination in classics and history, &c. It boldly urges a competition on the part of articulated clerks with the bar in legal knowledge, suggesting an education in common for the two branches of the profession, by permitting clerks passing a certain voluntary examination to attend the lectures given in the inns of court. Is this desirable? If the object be to amalgamate the two bodies, it is a step in the right direction; but is such an object expedient? The writer says: "Undoubtedly, considered in itself, it is a matter of very slight importance that a certain number of young men should receive instruction in the hall of an inn of court, instead of in the building of the Incorporated Law Society. But surrounding circumstances can give an importance to even less things than this. The attendance of students from both branches of the profession at the same lecture might mean nothing; but at the present time, and in the present crisis of the relation between the two branches, it would be indicative of a good deal. We are exactly in that position now when small things tell—when, to use

a homely saying, a straw will show which way the wind blows. That some change in the relation between the two branches of the profession will come, is quite evident; but no one can say what the change will be. We are not prepared to express an opinion in what exact direction the change ought to be made. In a country like England we cannot discuss the balance of expediency without reference to the traditions, the usages, and even the prejudices of large portions of society. But one thing is evident: if the two branches of the profession are to be placed on a footing of greater equality, what will effect this will be that common opinion places the representatives of the lower, as men of thought, learning, and general education, on a level with the representatives of the higher. What persons who wish to effect a change require is, a safe ascertained instance to which they can confidently refer. Now, it would be an argument of real weight, and, what is exceedingly important, of a weight easily appreciated by every one, if it were in the power of a solicitor to point to the fact, that there were, at any rate, some of his own body who received exactly as wide and as high a legal education as the first men at the bar. Socially, also, it would not fail to raise the status of solicitors if it were known that it was always open to them to be classed with the bar during the period of study. On the other hand, the bar could not fail to reap some advantage from the introduction of their new associates. The students intending to practise as solicitors would generally be men who would afterwards hold a prominent place in their own profession; and if anything could diminish the suspicion and reality of undue nepotism, it would be that the most eminent solicitors, by receiving their higher education in common with cotemporary barristers, should have learned not only where merit lies, but in what merit consists.

"It is possible that apprehensions might be entertained lest the institution of such a scheme should introduce a division into the lower branch itself. Solicitors might regret that there should be any arbitrary division drawn between members of their own ranks, and countenance given to the supposition that some portion of the body was higher and better educated than the rest. It is impossible to deny that those who chose to put themselves through the course we have suggested, would show that they were willing to submit to more trouble, and undergo a more solid preparation for their future duties, than those who refused or were not able to do so. And sometimes there might be some sort of injustice done to individuals in this way; and persons who were anxious and able to go through the course might be prevented by circumstances from doing so, and have an inferiority imputed to them which was quite

undeserved. This is true, and it is an imperfection which attaches to the plan; but it is an imperfection which also attaches to every scheme of education that is more than rudimentary. Since the Law Society have established the system of giving prizes and certificates of merit, they have introduced an educational division between the foremost and the less successful of their candidates. And the inequality reaches further back than the limits within which educational systems can operate. The students who would feel qualified to seek at a comparatively early age a high legal education, would necessarily be persons who would long have enjoyed many advantages. It would be indispensable that they should have such an acquaintance with either Latin or French as would imply that they had been fortunate enough to be taught well and early. The only reason why a special examination would be advisable before this class of students was admitted to attend the lectures of the inns of court, would be, that it would be absurd to expect that even the majority of articled clerks could have received a preliminary education sufficiently good to enable them to feel at home in the lecture-room. The division, therefore, already exists, and must exist. Some students in their early life are more fortunate and more forward than others. It can be no hardship that this should be recognised formally, if the recognition is likely to prove beneficial to the general body, to which the more and the less fortunate alike belong."

In connection with this subject of the preliminary examination, we may state that at the late meeting of the "National Association for the Promotion of Social Science," the subject of legal education was discussed, and that at the last meeting of the Metropolitan and Provincial Law Association some papers were read and discussions took place as to status and education of solicitors. In the one read by the secretary—"On the rise and progress of attorneys and solicitors as a professional body," by Mr. J. O. Watson, of Liverpool—the writer recommended that every articled clerk should undergo an examination at an earlier stage; that public lectures on law should be established in all the principal towns, a certificate of having attended a certain number of courses, before admission to practice; and that the law prohibiting an attorney or solicitor having more than two articled clerks should be abolished.

The chairman read the next paper, "The establishment of an educational qualification for attorneys," by Mr. J. P. Aston, of Manchester. The writer argued that there was a great need for something more than professional education for attorneys, and that the three sources to which some might look for this improvement were the Legis-

lature, the administration of the law, and attorneys themselves. But, in fact, attorneys must look to themselves; their united efforts would be necessary, and the law associations were the best media for those efforts. The mode of procedure would vary with the position and feeling of the particular associations; but there were some things that appeared capable of general application. Amongst these, every law association should seek to establish in connection with itself a junior association for articled clerks; an indispensable qualification for admission being the adducing of evidence of the applicant having undergone a certain amount of general education, the details being left to each parent association. Some acquaintance with classical literature, with mechanics, with general history, and especially the history of our own country, and of its constitution and laws, would seem requisite; and in the various districts appropriate differences would no doubt be made, in accordance with the peculiarities of each. (The connection between the parent and the junior associations should be real, not nominal; and occasional meetings should be held for discussing subjects of interest. Mr. Aston offered numerous suggestions for the carrying out of his ideas.

It having been previously agreed to discuss these three papers conjointly, the discussion was now proceeded with. It was extremely miscellaneous, and, after more than an hour had been consumed, Mr. Field urged that something should be done to give to the whole a practical result. He said that so long since as 1852 there were referred to the Incorporated Society several points, of which two might be taken as the most important:—First, a preliminary examination before admission, which was, no doubt—although there had been no direct communication to that effect—under consideration. The second was almost equally important—the substitution for one final examination, which would lead to a great deal of pure "cram," of a series of examinations, each final in itself, which would lead to constant reading upon the part of articled clerks, they going before the examination just when they were really acquainted with any one of the points of examination. Several resolutions, followed by amendments, were proposed, as the best mode of securing action; but, in the end, the following, proposed by Mr. Field, and seconded by Mr. Heelis, mayor of Salford, was adopted:—"That the committee of management be requested to seek a conference with the Council of the Incorporated Society, and that, if they should deem it necessary, they do take further steps for accomplishing the objects of those resolutions" [of 1852].

We suppose all articled clerks will approve that part of the recommendation which refers to the

establishment of *junior associations for articulated clerks*, a measure which we have for so many years advocated; and in connection with this we may refer our readers to another part of our publication, where they will find a letter from Mr. Isaac Walker, proposing a meeting at Birmingham of the articulated clerks, with the indispensable dinner, to consult upon measures for the welfare of the whole body of articulated clerks. Mr. Walker informs us that as the attention of law societies and the profession generally has been for some time and is at the present time more than ever alive to the subject of legal education, it is thought that as articulated clerks themselves are themselves the principal parties concerned in the matter, it is but right that they should have a voice in the matter, and give the profession an opportunity of hearing their view of the subject, and that a meeting of articulated clerks in the manner proposed is the best way of getting their opinion on the subject.

COURSES OF LAW STUDIES.

(Continued from p. 149).

Difference between law and mathematics.—There is this difference to be observed between the two sciences of law and of mathematics, that in the latter, in which the reasoning is always upon lines and angles, which are self-evident, we reason from the cause to the effect; while the propositions themselves are of a nature to succeed each other, so that the preceding are regularly the key or clue to those which follow. In the law, on the contrary, the order of our reasoning is usually the reverse of this. We reason from the effect to the cause; and, far from having the traces of their connection before us, as in a series of mathematical investigations, we have necessarily to deduce each required principle, or point of law, from materials of information dispersed through the whole circle of the science, and, not unfrequently, to supply the intermediate links of a long chain of implied reasoning, in order to prove that their application is legitimate.

Blackstone's notions of laws in general.—But to return; since the question is now of Blackstone's Commentaries (*ante*, pp. 78, 148), considered not merely as an elementary treatise, in which inaccuracies would be venial, and professional misconceptions of no serious consequence, but in the widely different, and far more important character, of an institute for educating and forming lawyers; I object, in the first place, to those half-explained metaphysical distinctions, contained in his introductory chapter, upon the nature of laws in general. He tells us, that "the law of nature is the will of the Supreme Being, founded in the relations of justice, that

existed, in the nature of things, antecedent to any positive precept; and, being coeval with mankind, and dictated by God himself, that this is of course superior in obligation to any other." Secondly, that "the precepts of the revealed law are of the same original with those of the law of nature, and their intrinsic obligation of equal strength and perpetuity." And, thirdly, that "the revealed law is of infinitely more authenticity than that moral system which is framed by ethical writers, and denominated the natural law; because the one is the law of nature, expressly declared to be so by God himself—the other is only what, by the assistance of human reason, we imagine to be that law; and, since we are not as certain of the latter as of the former, that they are, therefore, not of equal authenticity, nor to be put in competition together" (1 Bl. Com. Introd. pp. 39, 42).

Blackstone superficial, defective, mistaken, &c.—It is not, however, upon the ground of objections like these, that I presume to contend against the propriety of commencing the study of the law by reading and common-placing Blackstone's Commentaries. A distinction may be fairly taken between the introductory matter, which is but inducement to the proposed course of study, and that which is properly the substance of it. But if the substance itself is infected with the same discolourings; if the manner of instruction is superficial, and the materials defective; if conclusions of science are often misconceived, and points of practice mistaken or misrepresented, these are strong arguments (and I rely upon the subjoined examples for the proof of what I advance), that this is no institute for educating and forming lawyers! I must solicit the patience of my readers, if I expose these details of legal investigation with somewhat more than unprofessional minuteness. Assertions against public opinion require to be maturely weighed, and ought to be well supported. That I may not, however, make this a more tedious task than is necessary, I will endeavour to confine myself to those examples alone which are the most easy to be understood, and to be as brief as the nature of the subject will allow in the consideration of them. The argument may be dull, but the discussion is interesting.

Releases, explanation of.—Let us take, for example, the explanation which is given in Blackstone, of releases. Releases are defined to be a species of conveyance which may enure either—1, *per enlargir le estat*, as from the remainder-man or reversioner to the particular tenant; or, 2ndly, *per mitter le estat*, as between coparceners or joint-tenants; or, 3rdly, *per mitter le droit*, as from disseisor to disseisee; or, 4thly, *per extinguisher le droit*, as from disseisor to the lessee of disseisor; or, 5thly, by

way of entry and feoffment, as from disseisee to one of two disseisors (2 Bl. Comm. 324).

Distinction between release of right and extinguishment.—Now, I have three principal objections to make to this explanation of releases. The first is, that it does not point out the proper distinction between a release *per mitter le droit*, and a release *per extinguisher le droit*; viz., that in the former case the releasee can, but in the latter that he cannot, hold out every other. For example, a release *per mitter le droit*, is where the releasee can hold out every other. The release of the disseisee to the disseisor is of this description. And so it is if A., disseised by B. and C., releases to B. For B. shall now hold out C. in the same manner as if A. had regularly entered upon B. and C. as he might have lawfully done, and then made a separate feoffment to B. But if A. is disseised by B. who infeoffs C. and D., and afterwards A. releases to one of them, this is a release *per extinguisher le droit* of A. for the benefit of the two feoffees equally; for the one to whom the release is made cannot hold out the other.

Release to one of two disseisors and to one of two feoffees of disseisor.—The different operation of a release when made to one of two disseisors, and to one of two feoffees of a disseisor, is to be explained by the distinction which the law takes between a defective title and no title at all. For when the party has a defective title (not having the possession by his own wrong), the law protects him in the possession until he is lawfully evicted by the rightful claimant. But with respect to those who have no title at all, it is otherwise. Thus, if A. is disseised by B. and C., the disseisors have only a naked possession, unaccompanied with even the shadow of the right of possession; and, consequently, if A. releases to one of them, it operates as a feoffment to the releasee, precisely in the same manner as if A. had actually revested his former estate by his entry, and then granted, with livery of seisin, to the releasee (see Co. Litt. 275 b, and note 240). But where there are joint feoffees, and the disseisee releases to one of them, it operates for the benefit of each feoffee indifferently, because the feoffees have colour of title (Co. Litt. 194 b, 275 a, and note 239). For, originally, no tenant could make a feoffment without the lord's license; and when the lord consented to the alienation, the only form of conveyance was by livery of seisin, which was a public act, and to which the ceremonies of homage and fealty were also necessary. There was, consequently, in this case, a colourable title or presumption of right, but in the other case there was no pretence of any right or title at all (Co. Litt. 264 a, and note 208).

Release to lessee of disseisor.—Upon the same principle as before referred to, if the disseisee releases to

the lessee of the disseisor, this also is a release *per extinguisher le droit* of the disseisee, and of which the reversioner, as well as the lessee, shall have advantage. For they have both of them but one estate in law, and, therefore, the confirmation of the particular estate is equally the confirmation of the reversion. And so it is if a patron is usurped upon by two, and afterwards releases to one of them. It operates, by way of extinguishment, for the benefit of both equally; because the admission and institution are quasi a legal adjudication of the title.

Release where there is a right of entry, and where not.—There is a further distinction to be taken between the operation of releases *per mitter and vester le droit*, and those *per extinguisher le droit*: viz., that in the former case the releasor is supposed to have a right of entry, and in the latter not. To this rule, however, there are some exceptions. For example, A. was disseised by B., an infant, who made a feoffment to C., and afterwards C. died seised, and the land descended to his heir, D., B. being still an infant. Now, in this case, A.'s entry was taken away by the descent; but B., the infant, might either enter, or have a writ of *dum fuit infra etatem*, or a writ of right, before their abolition. In the mean time, if D. obtains a release from A., and afterwards B. brought a writ of right (before its abolition) he should have been barred by the release from A. to D. For in a writ of right, the question was of the mere right, and the words *modo et forma prout* are words of form only, and not of substance. And thus the original disseisee, having more mere right than the demandant, might have granted a release which should have enured *per mitter and vester* that right in the releasee, notwithstanding he had no longer a right of entry. (Co. Litt. 278 b). Since the 3 & 4 Will. 4, c. 27, when a person ceases to have a right of entry, his right of action is gone; indeed, the act extinguishes his right, and transfers the estate to the person who has gained a title by possession (9 Jur. 414; 1 Dru. and W. 258; 3 Id. 388; Browell, 21).

Releases per mitter le droit, and extinguishment.—Secondly, I apprehend that the releases which are here described (no. 3), *per mitter le droit*, and (no. 5), by way of entry and feoffment, are not exactly different species of releases, but only one and the same species, differing no otherwise than in circumstance. For every release which operates by way of entry and feoffment is in fact a release *per mitter le droit*; and if the disseisee releases, whether to one disseisor alone, or to one of two disseisors, it operates equally, in both cases, *per mitter and vester le droit* of the disseisee, and by way of entry and feoffment; that is to say, the releasee has the same title in both cases as if the disseisee had actually revested his

former estate by his entry, and afterwards made a feoffment with livery of seisin to the releasee, and he shall now hold out every other. And, thirdly, I object that there is another distinct species of release of which no notice whatever is here taken; namely, a release *per extinguisher le estate*; as from the grantee of a rent charge to the owner of the land, or a release of the services from the lord to the tenant, or a release of common of pasture, &c. (Co. Litt. 280 a, 307 b). If the lord sells the freehold of the inheritance of the copyhold to another, and afterwards the copyholder releases to the purchaser, this also is a release *per extinguisher le estate*, and the copyhold interest becomes extinct (1 Leon. 102, Wakeford's case).

Release of title.—The release of a title, as used in contradistinction to a *droit*, has also its peculiar operation; for this enures only by way of extinguishment. Suppose, for instance, A. infeoffs B. upon condition, and afterwards the condition is broken, and afterwards B. is disseised by C., and afterwards A. releases to C. A.'s release shall enure by way of extinguishment; so that if afterwards B. enters upon C., as he may lawfully do, he shall hold the land discharged of the condition (Co. Litt. 277 b). But supposing a *droit* to have been released, under the same circumstances, it would have enured for the reasons already mentioned, not *per extinguisher*, but *per miller and vester*, or, which has been shown to be in effect the same thing, by way of entry and feoffment. And as of a title of entry for condition broken, so it is of all other titles, by escheat, by forfeiture, &c.

Distinction between right and title.—There is a distinction, in law, between a right and a title properly so called: for, in the first place, rights are indifferently by descent or purchase; but titles, on the contrary, though subsequently completed by the entry or other act of the party, are always vested, in the first instance, by act and operation of law. Of this kind is a title of dower, title of entry for condition broken, title by escheat, by mortmain, and so forth (Co. Litt. 215 b). Secondly, a right includes not only a right for which a writ of right would have lain, but also any title or claim by force of a condition, mortmain, or the like, for which no action was given by the law, but only an entry (Co. Litt. 265 a). And hence it is said, that every right is a title, but every title is not a right; that is to say, not such a right for which an action will lie (Co. Litt. 345 b, 347 b). Again, in the case of a right, the entry of him that hath the right might, prior to the 3 & 4 Will. 4, c. 27, s. 39, have been taken away by a descent; but in the case of a title it was otherwise (Co. Litt. 240 b). Another general distinction is, that rights are transferable, whether

by release or otherwise; but titles, on the contrary, are not transferable (Co. Litt. 214 a; see 8 & 9 Vic. c. 106, s. 6).

Releases of estates and rights.—I have ventured to offer these few remarks, upon the nature of the operation of releases, by way of specimen of the sort of loose, inaccurate, superficial kind of professional instruction which is to be picked up from Blackstone's Commentaries. The apparent propriety with which he distinctly enumerates the five several species of releases, leaves us no room to suspect that anything material has been omitted. And yet, when we come to make the application of what we know upon the subject, we find our ideas unsettled, our information incomplete and unsatisfactory; and more particularly so, from no notice being taken of the distinction between releases of *estates* and of *droits*; a most important distinction, and which pervades the whole doctrine of the law of releases.

Of the distinction between releases of estates and of droits.—The release of an estate is, where there is already a vested estate at the time of the release made, both in the releasor and the releasee, and *privity* between the parties; that is to say, the releasee's estate must be *immediately* derived out of the releasor's estate, so that the two estates, together, make but one and the same estate in law. But the release of a *droit* is, where the releasor's estate has been previously divested or turned to a right, as in the case of abatement, intrusion, disseisin, discontinuance, or deforcement; and, consequently, where no *privity* is required, nor indeed can, from the nature of the case, exist between them (Co. Litt. 266 a, Ibid. 275 a). By the 3 & 4 Will. 4, c. 27, s. 39, no descent cast, discontinuance or warranty after the 31st December, 1833, shall toll or defeat any right of entry or action for the recovery of land. Rights of entry and rights of action are now co-existent and defeasible only by lapse of time.

Leases by husband seised in right of wife.—As for example: if A. seised in fee, in right of his wife B., makes a lease, for forty years, to D., and afterwards A. dies, and afterwards B. releases to D. generally, this is the release of an *estate*, and operates *per elargir le estate* of D. from a chattel to a freehold. But if A. being so seised, makes a lease for life to D. and afterwards A. dies, and afterwards B. releases to D. generally, this is the release, not of an *estate*, but of a *droit*, and operates *per extinguisher le droit* of B. in confirmation of D.'s lease for life, and also of the reversion which is in the heir of A. Why? Because, in the first instance, the lease was not void, but voidable. It divested not the estate of the wife; but, on the contrary, until avoided, it binds her estate. For the husband, who made the

lease, had the *jus possessionis*, or right of possession of the inheritance in the right of his wife, and now, the husband being dead, the possession of the lessee of the term is, in construction of law, the possession of the wife as tenant of the freehold, out of which the term is derived. It may be here observed that a lease is considered as a covenant real, that binds the possession of lands into whose hands soever it comes; if the lands be not evicted by a superior title; yet the termor has not the freehold in him, but holds the possession as bailiff of the freeholder, *nomine alieno*, by virtue of the obligation of the covenant (see the note 188 to Co. Litt. 249 a). But it is a maxim of law, that the estate which I may defeat by my entry, I may equally make good by my confirmation (Co. Litt. 300 a); and, therefore, the wife, upon the death of the husband, as above-mentioned, may confirm the estate of the lessee for years if she will, and not only by her express, but also by her implied confirmation, as by acceptance of rent, or any other act by which she tacitly admits the lessee to be her tenant. The acceptance of the rent is a sufficient declaration, that it is her will to continue the lease, for she is not entitled to the rent, but by the lease (see the note 117 to Co. Litt. 215 a). It follows, that the release from B. to D. is, in its first operation, an implied confirmation of D.'s estate; and, secondly, being made generally, it operates *per elargir son estate*, from a chattel to a freehold. Indeed, in a note in Saunders (see vol. 3, case 32, n. 9) it is suggested, that there is no privity between the wife and the lessee of the husband (but see 1 Bac. Ab. 302; 3 Bac. Ab. 305; Plowd. 137; and Cro. Jac. 332). The lease was not void by the death of the husband, but only voidable, and now being made good by the confirmation of the wife, the law supplies the required privity between the parties (see Co. Litt. 272 b). But, in the latter example, in which the husband is supposed to have leased to D. "for life," he has thereby divested or displaced the wife's estate, and turned it to a *droit*. He has also created a new reversion "in fee," which upon his death descends to his heir-at-law; and the wife could not avoid these estates by her entry at the common law, but only under the statute (stat. 32 H. 8, c. 33; and see Co. Litt. 297 b, 326 a, 333 b, 339 b). By the 3 & 4 Will. 4, c. 27, s. 29, no discontinuance after the 31st December, 1833, takes away or defeats any right of entry or of action.

Qualification of releases.—There is also a further distinction to be observed between releases of estates and of *droits*; viz., that the release of an estate admits of being qualified at the will of the releasor. Thus, the lord may release his seigniority to the tenant of the land, whether in fee, or in fee tail, or

for life, or for term of years. But the release of a *droit* admits of no such qualification; for, if released but for an hour, it is extinguished for ever (Co. Litt. 274 a, 280 a).

RECENT STATUTES (20 & 21 VIC.).

(Continued from p. 164.)

(By an accident the heading at p. 154 states the recent statutes to be the "19 & 20 Vic.," instead of "20 & 21," which subscribers will please to alter.)

JOINT-STOCK BANKING COMPANIES ACT, 1857 (20 & 21 VIC. c. 49).

This is a very important statute in relation to banking companies, and as it will for the future be the law by which they are regulated, we shall give it *in extenso*, prefacing, however, a short statement of its provisions for the guidance of our readers. It repeals the 19 & 20 Vic. c. 47, s. 2 (the Limited Liability Act, 1846), so far as it relates to banking companies, but in other respects, except as otherwise provided, it incorporates that act and the previous one of 1856, and no existing or future banking company is to be registered as a *limited* company (s. 3). Every banking company consisting of seven or more persons, and formed under the 8 Vic. c. 113, or 10 Vic. c. 75, shall, on or before the 1st of January, 1857, register itself as a company under this act (sect. 4). The penalty for not so registering is—first, that the company shall be incapable of suing, but not of being sued at law and in equity; secondly, no dividend shall be payable to a shareholder; thirdly, each director or manager incurs a penalty for every day that the company is in default, of £5, recoverable and applicable by any person to his own use. No other penalty can be imposed (sect. 5). Banking companies consisting of seven or more persons with a capital of fixed amount divided into shares of fixed amount, which also carry on business legally, and are not required to be registered under the act, may avail themselves of its privileges at any time by the consent of a majority of shareholders (sect. 6). This registration will not affect the previous liabilities and rights of the company and its members as shareholders (sects. 8, 9). New banking companies may be formed by seven or more persons registering themselves under the act as a company other than with limited liability; but the shares of such companies must be severally not less than of the value of £100. Not more than ten persons can form a banking partnership unless registered as a company under the act (sect. 13); and the company's affairs may at any time be investigated by inspectors appointed by one-third in number and value at least of the shareholders (sect. 14). If a banking com-

pany be registered inadvertently as limited, any creditor or member of the company will be entitled to an order for winding it up on proof of its registration as limited; and in such a case the members will be liable as in ordinary cases as contributories with unlimited liability for the deb'ts of the company and the costs of winding it up (sect. 17).

The following is the act itself, except the preamble, which recites that it is expedient to amend the law relating to copartnerships and companies carrying on the business of banking, and hereinafter included under the term "banking companies :"—

Preliminary.

Sec. 1. *Short title.*—This act may be cited for all purposes as "The Joint-Stock Banking Companies Act, 1857."

2. *Joint-Stock Companies Acts to be incorporated with this act.*—The Joint-Stock Companies Acts, 1856, 1857, shall be deemed to be incorporated with and to form part of this act.

Registration of existing Banking Companies.

3. *Sect. 2 of 19 & 20 Vic. c. 47, repealed.*—The 2nd section of the Joint-Stock Companies Act, 1856, shall be repealed so far as relates to persons associated together for the purpose of banking, subject to this proviso, that no existing or future banking company shall be registered as a limited company.

4. *Banking companies required to register under this act.*—Every banking company consisting of seven or more persons, and formed under the acts following, or either of them, that is to say—

(1.) An act passed in the eighth year of the reign of her present Majesty, chapter one hundred and thirteen, and intituled "An act to regulate joint-stock banks in England;"

(2.) An act passed in the tenth year of the reign of her present Majesty, chapter seventy-five, and intituled "An act to regulate joint-stock banks in Scotland and Ireland;"

shall, on or before the 1st of January, 1858, register itself as a company under this act.

5. *Penalty on neglect to register.*—If any banking company hereby required to register under this act makes default in registering on or before the said 1st of January, 1858, then, from and after such day, until the day on which such company is registered under this act, the following consequences shall ensue (that is to say):

(1.) The company shall be incapable of suing either at law or in equity, but shall not be incapable of being made a defendant to a suit either at law or in equity:

(2.) No dividend shall be payable to any shareholder in such company:

(3.) Each director or manager of the company shall for each day during which the company is in default incur a penalty of £5, and such penalty may be recovered by any person, whether a shareholder or not in the company, and be applied by him to his own use:

nevertheless such default shall not render the company so being in default illegal, nor subject it to any penalty or disability, other than as specified in this section.

6. *Banking companies permitted to register under this act.*—Any banking company, consisting of seven or more persons, having a capital of fixed amount, and divided into shares also of fixed amount, legally carrying on the business of banking previously to the passing of this act, and not being a company hereby required to be registered, may at any time hereafter, with the assent of a majority of such of its shareholders as may have been present in person, or in cases where proxies are allowed by the regulations of the company, by proxy, at some general meeting summoned for the purpose, register itself as a company other than a limited company under this act, and when so registered all such provisions contained in any act of Parliament, letters patent, or deed of settlement constituting or regulating the company, as are inconsistent with the Joint-Stock Companies Acts, 1856, 1857, or with this act, shall no longer apply to the company so registered; but such registration shall not take away or affect any powers previously enjoyed by such company of banking, issuing notes payable on demand, or of doing any other thing.

7. *Existing companies not to pay fees.*—No fees shall be payable in respect of the registration under this act of any banking company existing at the time of the passing of this act.

8. *Registration under this act not to affect obligations incurred previously to registration.*—The registration under this act of any banking company existing at the time of the passing of this act, and hereby required or authorised to be registered, shall not affect or prejudice the liability of such company to have enforced against it or its right to enforce any debt or obligation incurred, or any contract entered into by, to, with, or on account of such company, previously to such registration, and all such debts, obligations, and contracts shall be binding on the company when so registered, and the other parties thereto, to the same extent as if such registration had not taken place.

9. *Saving of liabilities of persons holding shares before registration under act.*—Every person who at or previously to the date of the registration under this act of any banking company hereby required or authorised to be registered may have held shares in

such company shall, in the event of the same being wound up by the court or voluntarily, be liable to contribute to the assets of the company the same amount that he would if this act had not been passed have been liable to pay to the company, or for or on account of any debt of the company in pursuance of any action, suit, judgment, or other legal proceeding that might, if this act had not been passed, have been instituted or enforced against himself or the company.

10. *Continuation of existing actions and suits.*—All such actions, suits, and other legal proceedings as may at the time of the registration under this act of any company hereby required or authorised to be registered have been commenced by or against such company or the public officer thereof may be continued in the same manner as if such registration had not taken place; nevertheless execution shall not issue against the effects of any individual shareholder in or member of such company upon any judgment, decree, or order obtained against such company in any action, suit, or proceeding so commenced as aforesaid; but, in the event of the property and effects of the company being insufficient to satisfy such judgment, decree, or order, an order may be obtained for winding up the company in manner directed by the Joint-Stock Companies Acts, 1856, 1857.

Winding up of the Banking Companies.

11. *Certain acts not to apply to companies registered under this act or acts incorporated herewith.*—The following acts, that is to say,—

- (1.) The act of the eleventh year of the reign of her present Majesty, chapter forty-five,
- (2.) The act of the thirteenth year of the reign of her present Majesty, chapter one hundred and eight,
- (3.) The act of the eighth year of the reign of her present Majesty, chapter one hundred and eleven,
- (4.) The act of the ninth year of the reign of her present Majesty, chapter ninety-eight,

shall not apply to companies registered under this act or under the acts incorporated herewith or either of them; and all companies so registered shall be wound up in manner directed by the said incorporated acts.

Repeal.

12. 7 & 8 Vic. c. 113, and 9 & 10 Vic. c. 75, *repealed.*—The above-mentioned acts, that is to say,—

The said act passed in the eighth year of the reign of her present Majesty, chapter one hundred and thirteen, and

The said act passed in the tenth year of the reign of her present Majesty, chapter seventy-five, shall forthwith be repealed as respects any banking company to be formed hereafter, and shall, from and

after such time as any company formed in pursuance of such acts or either of them may have registered as a company under this act, but not before, be repealed as respects the company so registered; and the articles of table B. in the schedule annexed to the Joint-Stock Companies Act, 1856, relating to "shares," to "transmission of shares," and to "forfeiture of shares," and numbered from one to nineteen, both inclusive, shall, from and after such time as last aforesaid, but subject to the power of alteration conferred by the Joint-Stock Companies Acts, 1856, 1857, be deemed to be regulations of any company formed in pursuance of the said acts passed in the eighth and tenth years of her present Majesty; nevertheless such repeal shall not affect any penalty, forfeiture, or other punishment incurred or to be incurred in respect of any offence against any acts hereby repealed committed before such repeal comes into operation; and notwithstanding anything contained in the said act of the eighth year of the reign of her present Majesty, chapter one hundred and thirteen, or in any other act, it shall be lawful for any number of persons, not exceeding ten, to carry on in partnership the business of banking in the same manner and upon the same conditions in all respects as any company, if not more than six persons, could before the passing of this act have carried on such business.

Formation of new Banking Companies.

13. *New banking companies.*—Seven or more persons associated for the purpose of banking may register themselves under this act as a company other than a limited company, subject to this condition, that the shares into which the capital of the company is divided shall not be of less amount than £100 each; but not more than ten persons shall after the passing of this act, unless registered as a company under this act, form themselves into a partnership for the purpose of banking, or if so formed carry on the business of banking.

Examination of Affairs in Company.

14. *One-third in number and value of shareholders to apply for inspectors.*—No appointment of inspectors to examine into the affairs of any banking company shall be made by the Board of Trade, in pursuance of the Joint-Stock Companies Act, 1856, except upon the application of one-third at the least in number and value of the shareholders in such company.

Nineteenth Section of Joint-Stock Companies Act not to apply.

15. *Sec. 19 of 19 & 20 Vic. c. 47, not applicable to companies in Scotland.*—The nineteenth section of the Joint-Stock Companies Act, 1856, shall not apply

to any banking company in Scotland registered under this act.

Transfer of Trust Property.

16. *Transfer of trust property to company.*—All such estate or interest in real and personal property in England and Ireland, and in property, heritable and moveable, in Scotland, and all such deeds, bonds, obligations, and rights as may belong to or be vested in any person or persons in trust for any banking company at the date of its registration under this act, or in trust for any other company at the date of its registration under the Joint-Stock Companies Acts, 1856, 1857, shall immediately on registration vest in such banking or other company; but no merger shall take place of any estates by reason of their uniting in the company under this section, without the express consent of the company, certified by some instrument under their common seal.

Banking Companies not registered as such.

17. *Liability of banking company that is not registered as such.*—If, through inadvertence or otherwise, a company that is in fact a banking company has, previously to the passing of this act, been registered as a limited company under the Joint-Stock Companies Act, 1856, or if, through inadvertence or otherwise, a company that is in fact a banking company is hereafter registered under the said Joint-Stock Companies Acts, 1856, 1857, as a limited company, any company so registered shall not be illegal, nor shall the registration thereof be invalid, but it shall be subject to the following liabilities; that is to say,—

- (1.) Any creditor or member of the company may petition the court to have it wound up, and the fact of its being registered as a limited company shall of itself be a sufficient circumstance on which an order shall be made for winding up the same:
- (2.) In the event of such company being wound up, the contributories shall, whether the company is or not registered as a limited company, be liable to contribute to the assets of the company to an amount sufficient to pay its debts, and the costs, charges, and expenses of winding up the same.

Saving Clauses.

18. *Exemption of certain existing banking companies from Joint-Stock Companies Acts.*—The Joint-Stock Companies Acts, 1856, 1857, shall not apply to any banking company legally carrying on the business of banking previously to the passing of this act, and not hereby required to be registered, until such time as such company registers itself under this act, in pursuance of the power hereby given in that behalf.

19. *Not to affect provisions of 7 & 8 Vic. c. 32, and 8 & 9 Vic. c. 38.*—Nothing herein contained shall affect an act passed in the eighth year of the reign of her present Majesty, and intitled "An act to regulate the issue of bank notes, and for giving to the Governor and Company of the Bank of England certain privileges, for a limited period," or an act passed in the ninth year of the reign of her present Majesty, chapter thirty-eight, intitled "An act to regulate the issue of bank notes in Scotland," or any other act relating to the issue or circulation of bank notes.

EXAMINATION QUESTIONS.

(*Michaelmas Term, 1857.*)

I. PRELIMINARY.

I. Where, and with whom, did you serve your clerkship? II. State the particular branch or branches of the law to which you have principally applied yourself during your clerkship. III. Mention some of the principal law books which you have read and studied. IV. Have you attended any, and what law lectures?

II. COMMON AND STATUTE LAW AND PRACTICE OF THE COURTS.

I. State some of the principal acts of Parliament affecting the common law which have been passed during the last five years. II. State the nature and requisites of a contract not under seal. III. State some of the maxims by which contracts are expounded. IV. What will constitute a partnership with regard to third parties? V. What is the meaning of stoppage *in transitu*, and what is the point to be considered with reference to the exercise of such right? VI. What is necessary in order to enable a person to set off a debt against another sought to be recovered? VII. What course should you adopt in order to be able to proceed with your action, where personal service of the writ of summons cannot be effected? VIII. In what cases may the writ contain a special indorsement of the plaintiff's claim? IX. What is the effect of a special indorsement in the event of no appearance being entered on the part of a defendant? X. What is necessary to constitute a good plea of tender, and how may such tender be avoided? XI. Within what time must a motion be made for a new trial, where a cause has been tried at the assizes? XII. What must be done in order that a judgment of the superior courts may be made to affect the lands or tenements of the judgment debtor, and how often must the operation be renewed? XIII. What will preclude a person from making an application to set aside process for irregularity? XIV. A creditor,

such company shall, in the event of the same being wound up by the court or voluntarily, be liable to contribute to the assets of the company the same amount that he would, if this act had not been passed have been liable to pay to the company, or for or on account of any debt of the company in pursuance of any action, suit, judgment, or other legal proceeding that might, if this act had not been passed, have been instituted or enforced against himself or the company.

10. *Continuation of existing actions and suits.*—All such actions, suits, and other legal proceedings as may at the time of the registration under this act of any company hereby required or authorised to be registered have been commenced by or against such company or the public officer thereof may be continued in the same manner as if such registration had not taken place; nevertheless execution shall not issue against the effects of any individual shareholder in or member of such company upon any judgment, decree, or order obtained against such company in any action, suit, or proceeding so commenced as aforesaid; but, in the event of the property and effects of the company being insufficient to satisfy such judgment, decree, or order, an order may be obtained for winding up the company in manner directed by the Joint-Stock Companies Acts, 1856, 1857.

Winding up of the Banking Companies.

11. *Certain acts not to apply to companies registered under this act or acts incorporated herewith.*—The following acts, that is to say,—

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- (2.) The act of the thirteenth year of the reign of her present Majesty, chapter one hundred and eight,
- (3.) The act of the eighth year of the reign of her present Majesty, chapter one hundred and eleven,
- (4.) The act of the ninth year of the reign of her present Majesty, chapter ninety-eight,

shall not apply to companies registered under this act or under the acts incorporated herewith or either of them; and all companies so registered shall be wound up in manner directed by the said incorporated acts.

Repeal.

12. 7 & 8 Vic. c. 113, and 9 & 10 Vic. c. 75, *repealed.*—The above-mentioned acts, that is to say,—

The said act passed in the eighth year of the reign of her present Majesty, chapter one hundred and thirteen, and

The said act passed in the tenth year of the reign of her present Majesty, chapter seventy-five, shall forthwith be repealed as respects any banking company to be formed hereafter, and shall, from and

after such time as any company formed in pursuance of such acts or either of them may have registered as a company under this act, but not before, be repealed as respects the company so registered; and the articles of table B. in the schedule annexed to the Joint-Stock Companies Act, 1856, relating to "shares," to "transmission of shares," and to "forfeiture of shares," and numbered from one to nineteen, both inclusive, shall, from and after such time as last aforesaid, but subject to the power of alteration conferred by the Joint-Stock Companies Acts, 1856, 1857, be deemed to be regulations of any company formed in pursuance of the said acts passed in the eighth and tenth years of her present Majesty; nevertheless such repeal shall not affect any penalty, forfeiture, or other punishment incurred or to be incurred in respect of any offence against any acts hereby repealed committed before such repeal comes into operation; and notwithstanding anything contained in the said act of the eighth year of the reign of her present Majesty, chapter one hundred and thirteen, or in any other act, it shall be lawful for any number of persons, not exceeding ten, to carry on in partnership the business of banking in the same manner and upon the same conditions in all respects as any company, if not more than six persons, could before the passing of this act have carried on such business.

Formation of new Banking Companies.

13. *New banking companies.*—Seven or more persons associated for the purpose of banking may register themselves under this act as a company other than a limited company, subject to this condition, that the shares into which the capital of the company is divided shall not be of less amount than £100 each; but not more than ten persons shall after the passing of this act, unless registered as a company under this act, form themselves into a partnership for the purpose of banking, or if so formed carry on the business of banking.

Examination of Affairs in Company.

14. *One-third in number and value of shareholders to apply for inspectors.*—No appointment of inspectors to examine into the affairs of any banking company shall be made by the Board of Trade, in pursuance of the Joint-Stock Companies Act, 1856, except upon the application of one-third at the least in number and value of the shareholders in such company.

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15. *Sec. 19 of 19 & 20 Vic. c. 47, not applicable to companies in Scotland.*—The nineteenth section of the Joint-Stock Companies Act, 1856, shall not apply

to any banking company in Scotland registered under this act.

Transfer of Trust Property.

16. *Transfer of trust property to company.*—All such estate or interest in real and personal property in England and Ireland, and in property, heritable and moveable, in Scotland, and all such deeds, bonds, obligations, and rights as may belong to or be vested in any person or persons in trust for any banking company at the date of its registration under this act, or in trust for any other company at the date of its registration under the Joint-Stock Companies Acts, 1856, 1857, shall immediately on registration vest in such banking or other company; but no merger shall take place of any estates by reason of their uniting in the company under this section, without the express consent of the company, certified by some instrument under their common seal.

Banking Companies not registered as such.

17. *Liability of banking company that is not registered as such.*—If, through inadvertence or otherwise, a company that is in fact a banking company has, previously to the passing of this act, been registered as a limited company under the Joint-Stock Companies Act, 1856, or if, through inadvertence or otherwise, a company that is in fact a banking company is hereafter registered under the said Joint-Stock Companies Acts, 1856, 1857, as a limited company, any company so registered shall not be illegal, nor shall the registration thereof be invalid, but it shall be subject to the following liabilities; that is to say,—

- (1.) Any creditor or member of the company may petition the court to have it wound up, and the fact of its being registered as a limited company shall of itself be a sufficient circumstance on which an order shall be made for winding up the same:
- (2.) In the event of such company being wound up, the contributories shall, whether the company is or not registered as a limited company, be liable to contribute to the assets of the company to an amount sufficient to pay its debts, and the costs, charges, and expenses of winding up the same.

Saving Clauses.

18. *Exemption of certain existing banking companies from Joint-Stock Companies Acts.*—The Joint-Stock Companies Acts, 1856, 1857, shall not apply to any banking company legally carrying on the business of banking previously to the passing of this act, and not hereby required to be registered, until such time as such company registers itself under this act, in pursuance of the power hereby given in that behalf.

19. *Not to affect provisions of 7 & 8 Vic. c. 32, and 8 & 9 Vic. c. 38.*—Nothing herein contained shall affect an act passed in the eighth year of the reign of her present Majesty, and intitled "An act to regulate the issue of bank notes, and for giving to the Governor and Company of the Bank of England certain privileges for a limited period," or an act passed in the ninth year of the reign of her present Majesty, chapter thirty-eight, intitled "An act to regulate the issue of bank notes in Scotland," or any other act relating to the issue or circulation of bank notes.

EXAMINATION QUESTIONS.

(Michaelmas Term, 1857).

I. PRELIMINARY.

I. Where, and with whom, did you serve your clerkship? II. State the particular branch or branches of the law to which you have principally applied yourself during your clerkship. III. Mention some of the principal law books which you have read and studied. IV. Have you attended any, and what law lectures?

II. COMMON AND STATUTE LAW AND PRACTICE OF THE COURTS.

I. State some of the principal acts of Parliament affecting the common law which have been passed during the last five years. II. State the nature and requisites of a contract not under seal. III. State some of the maxims by which contracts are expounded. IV. What will constitute a partnership with regard to third parties? V. What is the meaning of stoppage *in transitu*, and what is the point to be considered with reference to the exercise of such right? VI. What is necessary in order to enable a person to set off a debt against another sought to be recovered? VII. What course should you adopt in order to be able to proceed with your action, where personal service of the writ of summons cannot be effected? VIII. In what cases may the writ contain a special indorsement of the plaintiff's claim? IX. What is the effect of a special indorsement in the event of no appearance being entered on the part of a defendant? X. What is necessary to constitute a good plea of tender, and how may such tender be avoided? XI. Within what time must a motion be made for a new trial, where a cause has been tried at the assizes? XII. What must be done in order that a judgment of the superior courts may be made to affect the lands or tenements of the judgment debtor, and how often must the operation be renewed? XIII. What will preclude a person from making an application to set aside process for irregularity? XIV. A creditor,

having obtained a judgment against a debtor, dies. What is required to be done by his executor, in order that he may be in a position to attach a debt due to the judgment debtor, with a view to satisfy the judgment recovered by his testator? XV. Does the Statute of Limitations apply where a debtor was abroad when the cause of action accrued, and who has not returned to this country, and if not, within what time may the action be commenced?

III. CONVEYANCING.

I. Who is the proper party to present to a vacant benefice, the mortgagor or mortgagee of the advowson? Have you any reason for your opinion? II. State the principal provisions of the Settled Estates Act, 19 & 20 Vic. c. 120. III. What is necessary to effect an exchange of lands under the General Inclosure Act? IV. Who are the proper parties to assign a lease of a deceased testator, who bequeathed it specifically, and why? V. A. devises his farm at B. to C. without any words of limitation—what estate would C. take if the testator died in 1801; what if he died in 1857, and why? VI. What are the duties of the solicitor in comparing an abstract of title with the deeds, &c.? VII. Can a married woman dispose of a reversionary interest in a sum of money; and has the law as to this been changed, and in what respects? VIII. A. dies intestate, and without issue, leaving a widow, mother, and brothers—what interest do they take in his real, and what in his personal estate? IX. Can the omission by a lessee to perform a covenant to insure, to repair, or pay rent, be cured, and how? X. What is the object of taking assignments of outstanding terms? Is it ever desirable to do so now, and why? XI. In what case prior to 8 & 9 Vic. c. 106, was a feoffment necessary, and why? XII. Is it necessary to register wills relating to property in a register county? And state the reasons why it is, or is not, necessary? XIII. A copyholder dies, having devised all his estates to B., with power to trustees to sell the copyholds. The trustees sell at once. By what instrument should they convey the copyholds, and what fine will be due to the lord, and by whom paid? XIV. Is the assignee of a lease ever, and when, liable as between him and the lessor, to the rent and covenants? XV. What is the protector of a settlement, what the origin of the office, and what his powers?

IV. EQUITY AND PRACTICE OF THE COURTS.

I. Define the technical meaning of equity as contradistinguished from its general or ordinary meaning. II. State the origin of the equitable jurisdiction of the Court of Chancery. III. Before the jurisdiction of the court was settled, what were the

limits placed to its power? Mention some of the cases from the year books in which its interposition was applied for, by way of illustration. IV. Could a judgment obtained by fraud at common law be then set aside in equity? How was this settled in 1616, and by whom, and on what occasion? V. Who were the distinguished chancellors who subsequently reduced the system into order, and to whom above all is the greatest share of merit ascribed in this respect? VI. The modern system of equity established—state in what respect the maxim "*Equitas sequitur legem*" is the rule, with any, and what, exception. VII. In what cases has equity jurisdiction, exclusive of the common law? VIII. In what cases has it concurrent jurisdiction? IX. In what cases is it auxiliary to the common law? X. And with what latitude does equity construe statute law? XI. What is the distinction between the judicial and the administrative jurisdiction of the court? Name the officers who preside over each branch. XII. Of what courts are the appellate jurisdiction composed? Set forth the various steps from the first decree of a Vice-Chancellor to the highest court of appeal in the realm. XIII. How and when did the House of Lords gain the power of sitting as the highest court of appeal? XIV. Describe the mode of instituting a suit, suppose—for the specific performance of a contract for the sale of real estate—and the process, step by step, down to the final decree, and the mode in which it is to be enforced. N.B.—You are expected to answer with particularity. XV. Can a court of equity permit the tenant for life of an estate who is impeachable for waste to commit waste; and will it permit a tenant, whether so impeachable or not, to grant a lease for a longer period than twenty-one years, or the life of such tenant? If so, state under what circumstances, and by what authority, it has such power.

V. BANKRUPTCY AND PRACTICE OF THE COURTS.

I. Enumerate the different acts of bankruptcy. II. In what cases may articles of merchandise be sold without subjecting the vendor to the bankrupt laws? III. What are the acts of bankruptcy which a trader may voluntarily commit, and what the acts which he may be compelled to commit? IV. After what lapse of time from an act of bankruptcy committed does a trader cease to be liable to be made a bankrupt on that act of bankruptcy? V. What are the requisites to support a petition by a creditor for an adjudication in bankruptcy? VI. What is the course of proceeding to obtain adjudication against a joint-stock company? VII. What is the consequence of a person becoming bankrupt a second time? VIII. In what respect does a debt upon

which an adjudication will be supported differ from a debt which may be proved under the bankruptcy? IX. How does the debt of a petitioning creditor differ from a debt proveable under the adjudication? X. What is the rule as to proof by separate creditors under a joint adjudication, and *vice versa*? XI. Is a surety for the bankrupt entitled to prove under the adjudication in any, and what cases? XII. How are creditors' assignees chosen? XIII. In what manner, and at what time, does the estate of a bankrupt become vested in his assignees? XIV. Is there any, and what, property in the bankrupt's possession or control at the time of his bankruptcy which will not pass to his assignees? XV. If a trader make an assignment of a policy of assurance on his life, would you give notice of such an assignment? And if so, to whom, and for what reason?

VI. CRIMINAL LAW AND PROCEEDINGS BEFORE MAGISTRATES.

I. Name the several courts in England having jurisdiction in criminal matters, and state in which of them this jurisdiction is limited, and to what extent? II. Detail the several steps to be taken in a criminal prosecution, from the caption of the accused by the police, to his sentence; and supposing the accused to be an alien, what is his privilege as regards the jury upon his trial? III. What is high treason? and give some instances of the offence. IV. Name the several crimes comprehended in the term "homicide," and give a definition of each of such crimes. V. In an indictment for murder, is it necessary to describe the instrument with which, and the manner in which, the murder was committed? VI. Distinguish the punishment attaching to the several kinds of homicide which are punishable. VII. Define the crime of burglary, and state what evidence is necessary to support an indictment for that offence. VIII. What is meant by breaking and entering a building within the curtilage of a dwelling-house? IX. Define the offence of forgery and uttering forged documents. X. Define the offence of embezzlement, and give an instance distinguishing the offence from common larceny. XI. What are the essential proofs to sustain an indictment for receiving stolen goods? XII. Define the offence of perjury. Is it a felony or a misdemeanor? And by how many witnesses must the offence be proved? XIII. Upon an indictment for obtaining money or goods by false pretences, what is the nature of the false representation that must be proved? and give an instance. XIV. State shortly the several provisions of the statute 20 & 21 Vic. c. 54, for making better provision for the punishment of frauds by trustees and others. XV. What is a criminal information? And state by what court, and under what circumstances, leave is given to file the same.

EXAMINATION ANSWERS.

(Michaelmas Term, 1857.)

CONVEYANCING (*ante*, p. 194).

I. Mortgage of advowson.—The mortgagor of an advowson has a right to nominate to the living on a vacancy, and even to compel the mortgagee to present his nominee, although there be an actual engagement between them that the mortgagee shall, after default made, have the right to present (see *Jory v. Cox*, Prec. Ch. 71; *Galley v. Selby*, Strange 403; *Mackenzie v. Robinson*, 3 Atkyns, 559). The ground of this doctrine is that in equity the mortgagor remains the actual owner of the estate (see *Francis Max. max.* 13; *Casborne v. Scarfe*, 1 Atk. 602). Or, perhaps, rather that the presentation is not a profit for which the mortgagee can give credit in account upon a redemption (*Crabb's Real Prop.* Dig. sects. 22, 39; see *Coote's Mortg.* pp. 33, 202, 3rd. edit.). A mortgage of an advowson should always include a power of sale, and be made in fee.

II. Settled Estates Act.—The Settled Estates Act, the 19 & 20 Vic. c. 120, has for its object to enable the Court of Chancery to authorise leases and sales of settled estates where the same shall be deemed proper and consistent, with a due regard for the interests of all the parties entitled under the instrument limiting the property. The application to the court must be by petition by the tenant for life, with the concurrence or consent of the trustees, having any estate for the benefit of any unborn child (s. 17), or without such consent, where the rights of the parties are not to be affected (s. 18). Notice of the application must be given to the trustees, and be inserted in certain newspapers. After the presentation of the petition, application is made in the judge's chambers, *ex parte*, for directions as to the notices in the newspapers. Within twenty-one days after the publication of the last advertisement, the petition is set down for hearing (3 Law Chron. 169). The act also enables persons in possession of land for certain limited interests to grant agricultural or occupation leases thereof, at rack-rent, for a reasonable period (3 Law Chron. pp. 105, 111, 196, 209, 214, 286; *ante*, p. 48).

III. Exchange under the Inclosure Act.—In order to effect an exchange under the General Inclosure Act (the 41 Geo. 3, c. 109), the consent in writing of the persons seised of the lands, &c., in the parish or manor in which an inclosure is to take place must be obtained; where the parties are under disabilities, the consent of their husbands, guardians, &c., will suffice. The exchanges must be specified in the award, and then they become effectual (*Burt. pl.* 1154; 1 Prest. Abstr. 161). As to exchanges where

there is no inclosure, see 3 Law Chron. 337; the objections as there stated have mostly been obviated by the 20 & 21 Vic. c. 31 (*ante*, pp. 160, 161).

IV. *Assignment of bequeathed leaseholds*.—Where a lease has been bequeathed specifically, the executor alone may assign it, because, until he assents to the bequest, the whole interest of the testator is in him in order to enable him to discharge the testator's debts. Where, however, the testator has been long dead, it is usual to require the legatees to join, because, then, it is possible all the debts may have been paid, and an assent given to the bequest (Burt. pl. 931, 945; Dart's Vend. 386, 3rd edit.; Att. Gen. v. Potter, 9 Jur. 241; Sneesly v. Thorne, 19 Jur. 586, 1058).

V. *Devise without words of limitation*.—On a devise of a farm at B. to C., without any words of limitation, if the testator died in 1801, C. would take a life estate only, and it would be the same though he died in 1857, if the will was made before the 1st of January, 1838, and not afterwards brought down to a later date by a codicil. The reason is, that prior to the 7 Will. 4, and 1 Vic. c. 26, it was necessary that an intention should be shown to pass more than a life interest, and by the use of the word "farm at B.," such an intention was not shown. But by that act, which applies to wills made, or brought down by a codicil, to the 1st of January, 1838, a devise without words of limitation will pass a fee simple unless a contrary intention be shown (Burt. Comp. pl. 284, 290; 3 Law Chron. 149).

VI. *Examining abstract*.—In examining an abstract of title with the title deeds, the attention of the solicitor should be particularly directed to the descriptions of the parties, the recitals, the parcels, and the covenants for quiet enjoyment, free from incumbrances which frequently lead to incumbrances and facts which have been suppressed. This should be particularly attended to, as a purchaser is bound by every deed or fact, to which an instrument in his possession leads by recital or description (see Sugd. Vend. and Purch. 437, 11th edit.). The solicitor must also scrutinise the execution and attestation of deeds and wills, the receipts indorsed, and the stamps; and he should carefully peruse all settlements and wills from beginning to end, in order that no clause that can possibly affect the title may escape (1 Jarman and Byth. Convey. by Sweet).

VII. *Feme covert, disposing of reversionary interest in money*.—A feme covert can, on and after the 1st of January next, dispose of a reversionary interest in a sum of money, where the instrument (not being a settlement on marriage) is made on or after that day (20 & 21 Vic. c. 57; *ante* p. 156; for present law, see 2 Law Chron. pp. 28, 348).

VIII. *Intestacy—Distribution*.—As there are no

children of the intestate, or descendants of them, the widow will take a moiety of his *personal* estate, and his mother and brothers will take the other moiety in equal shares between them (Burt. Comp. pl. 518, 521, 1402; 2 Steph. Com. 251, 1st edit.). As to the deceased's *real* estate, the eldest brother will be entitled thereto, subject to the widow's dower, if not barred.

IX. *Omission by lessee to observe covenants*.—The omission of a lessee to pay his rent may be cured by the acceptance of the rent subsequently, or even by a tender, or by payment into court as directed by the Common Law Procedure Act, 1852, ss. 211, 212; the omission of the covenant to repair may be also cured by the acceptance of rent subsequently with a knowledge of such breach; and in equity these breaches of covenant will be relieved against: indeed, equity relieves wherever payment of money is an adequate compensation, and the lessor is placed in the same position as if no breach of covenant had been committed; but in the case of the omission to insure, the lessor cannot be put in such a position: the risk has been run: the receipt of rent will not waive the breach accruing by the *continued* neglect, and there can be no relief in equity in respect thereof (2 Law Chron. 299, 300; Elliott v. Turner, 13 Sim. 477; 5 Jur. 1178; 3 Id. 12).

X. *Outstanding terms*.—The object of taking an assignment of an outstanding term was to protect a purchaser from incumbrances subsequent to the creation of the term. But this operation is given, by the 8 & 9 Vic. c. 112, to every satisfied term which, on the 31st of December, 1845, was attendant by express declaration, without any assignment. Terms are now sometimes assigned to meet the possible case of the purchaser proving not to be the legal owner of the fee (Doe d. Clay v. Jones, 13 Jur. 824; Doe v. Price, 16 Mees. and W. 603; Horsey's Purch. 96—98; 1 Law Chron. 410, 411).

XI. *Corporation conveying by feoffment*.—By some very weighty authorities it has been said that a corporation cannot be seised to a use (2 Black. Com. 280; 5 Jur. 618). A contrary doctrine, so far as regards conveyances of corporations by bargain and sale, seems to be laid down in Sir Thos. Bolland v. Morris (Leonard, 183; 2 Id. 121; 3 Id. 175). In that case it was said, "Upon a bargain and sale to a corporation, a trust may be limited that they shall dispose of the rents and profits among the poor of the corporation," and "that a corporation may charge its own possessions with an use." These assertions, however, are not considered as law (1 Co. Rep. 137 a.). The usual mode, in order to avoid the objection that corporations could not be seised to a use, was, till lately, that they should convey by feoffment, or by lease and release, with

an actual entry by the lessee previous to the release; after which the release passed the reversion (Co. Litt. 271 b, note (1); 1 Steph. Com. 334), but now, under the 8 & 9 Vic. c. 106, a common law grant, upon which uses may be engrafted, may be used.

XII. Registering wills.—By the Registry Acts it is requisite, in general, to register wills relating to real property within the registry counties—*i. e.*, Middlesex and Yorkshire—and a limited time is appointed for that purpose (see 1 Law Chron. pp. 20, 21; 2 Id. 192, 193; 3 Id. 358). But if the vendor be both heir-at-law and devisee, the non-registry of the will is immaterial; for if he sell to any subsequent purchaser, it must be either in the character of heir-at-law, or in the character of devisee. If he sell in this character, the second purchaser must have notice of the will; if he contract in that, the first purchaser has already procured the legal estate (Sugden's Vend. and Purch. 483).

XIII. Power by will to trustees to sell copyholds.—Where the trustees have a mere power to sell, they convey by bargain and sale: their previous admittance is not necessary. One fine only will be payable to the lord, and this must be paid by the purchaser in the absence of stipulation to the contrary. A difficulty frequently arises where the widow of the testator is entitled to free-bench, and it is desired to pass her estate to the purchaser. This should be provided against in the will, but it is generally overlooked (Key, Convey. pp. 18, 21; Holden v. Preston, 2 Wils. 400; Dart's Vend. 464, 3rd edit.).

XIV. Assignee of lease, liability.—An equitable assignee of a lease is not liable to the lessor unless he has entered into possession under the title of the original lessee, and then only during the continuance of his possession (Moore v. Greg, 2 Phil. 717; Cox v. Bishop, 5 Weck. Rep. 437; 3 Law Chron. pp. 315, 370). In the case of a legal assignee, there is privity of estate only, and he is liable only while he continues to be legal assignee; that is, while in possession under the assignment; except, indeed, according to Bacon's Abridgment, in the case of rent, for which, though he assigns over, he is, notwithstanding, liable as to the arrears incurred before, as well as during his enjoyment (Bacon's Abr. tit. "Covenant," E. 4; Le Keux v. Nash, 2 Stra. 1221; Woodf. Landlord and Tenant, 622, 6th edit.). An assignee being only liable while in possession, if he assigns over before a breach, he is not liable in an action of covenant, though his assignee has not taken possession (Taylor v. Shum, 1 Bos. and Pul. 21; Eaton v. Jaques, Dougl. 452; Harr. Woodf. Landlord and Tenant, 621; 1 Will. Sand. 241 d., n. e.).

XV. Protector of settlement.—When recoveries were in use, it was necessary, where an estate tail was preceded by a life estate, that the tenant for life

(except in cases provided for by statute) should concur in the recovery, for without his concurrence no valid recovery could be effected so as to bar the estate tail. The act for abolishing fines and recoveries has preserved the necessity for such party joining in the dispositions effected under that act, by constituting the owner of such freehold estate *protector of the settlement*, and making his consent necessary to a full disposition of the lands settled—*i. e.*, against persons in remainder or reversion, &c. But such consent is not required by a tenant in tail having the immediate remainder or reversion in fee. And where the tenant in tail has not the immediate reversion, &c., he may, without such consent, make a valid disposition as against persons claiming under the estate tail, though not as against persons claiming in remainder or reversion, or in defeasance of such estate tail (Hayes' Convey. 166, 170, 4th ed.).

COMMON LAW.

I. Acts of Parliament—Common law.—It is very doubtful what the examiners mean by this question, seeing how ambiguous is the term "Common Law" (2 Law Chron. pp. 6, 210, 236). We should suppose that the examiners refer to common law practice, and accordingly it may be answered that the principal acts affecting the practice of the common law within the last five years, are the 15 & 16 Vic. c. 76 (the Common Law Procedure Act, 1852); the 17 & 18 Vic. c. 125 (the Common Law Procedure Act, 1854); and the 18 & 19 Vic. c. 67 (the Bills of Exchange Summary Procedure Act, 1855) (see 1 Law Chron. 155—163; 2 Id. 63, 202).

II. Contract not under seal, nature and requisites.—Contracts not under seal, otherwise called simple contracts, are such as are not ascertained by matter of record, nor by writing under seal. They are not valid unless founded on a sufficient consideration, and they do not (excepting bills of exchange and promissory notes, 2 Law Chron. 335) import consideration—*i. e.*, the law will not presume a consideration till one appears. In some instances the contracts must be in writing, and even state a consideration; but by the Mercantile Law Amendment, 1856 (the 19 & 20 Vic. c. 97; 3 Law Chron. 88—92), s. 3, a consideration for a guarantee need not now appear. 2 Law Chron. p. 334, should be altered in this respect (see 2 Law Chron. 333—336; 2 Black. Com. ch. 30; 2 Steph. Com. ch. 5).

III. Contracts, rules for construction.—The chief maxims or rules by which contracts not under seal are to be construed are—1, that the general intention to be collected from the whole context, and every part of the writing, is always to be preferred to the particular expression (see Mallam v. May, 13 Mees. and W. 517); 2, no oral evidence can be

given to add to, subtract from, or in any manner alter or vary a written contract (2 Law Chron. 335); but if the language of a written contract is such as the courts do not understand, if it is written in cipher or in a foreign tongue, or the parties have used technical terms and words of art unintelligible to the ordinary reader, but having a clear, distinct, and definite meaning amongst mechanics or merchants, extrinsic evidence of such meaning may be given in aid of the interpretation of the writing, and to give the words their proper and known signification (*Clayton v. Nugent*, 13 Law Journ. N. S. Exch. 365; see First Book, 9—11; 23 Law Tim. Rep. 154); 3, the construction must be such as will preserve rather than destroy; 4, if the contract cannot be construed so as to operate in one way, it shall operate in that which by law will effectuate the intention; for, *quando res non valet ut ago, valeat quantum valere potest* is the rule of law (per *Ld. Mansfield*, Cowp. 600; cited 6 East. 105; 2 Law Chron. 335).

IV. *Partnership*.—An agreement to share in the profits of a business will, at least as regards strangers, constitute a partnership (*Waugh v. Carver*, 2 H. Black. 235; *Smith's Merc. Law*, by Dowd. 19, 20; 2 Law Chron. 23; *Pott v. Eyton*, 3 Com. Ben. R. 39; *Hickman v. Cox*, 2 Jur. N. S. 884; 3 Law Chron. 154).

V. *Stoppage in transitu*.—This is the right which the law gives a vendor of goods in certain cases to reclaim the goods previously sold, but not paid for, whilst in their transit, to the purchaser. The exercise of the right arises only where the purchaser becomes bankrupt or insolvent at any time prior to the time when the goods, if not stopped, would have reached the purchaser (*Roscoe's Evid.* 538, 5th ed.; *Addison's Contr.* 61; *M'Ewan v. Smith*, 13 Jur. 265; 2 Law Chron. 191, 336).

VI. *Set-off*.—To enable a person to set-off a debt (i. e., a liquidated debt), the debt sued for, and the debt intended to be set-off must be *mutual*, and due in the same right (1 Law Chron. 23, 24, 307, 327; 2 Id. 190; 3 Id. 223; *Mardale v. Thelluson*, 28 Law Tim. Rep. 160).

VII. *Process, no personal service*.—If the defendant cannot be served personally with a copy of the writ of summons, the plaintiff should apply on affidavit to the court or a judge, showing that he has made exertions to serve the writ, and that the same has come to the defendant's knowledge, or that he wilfully evades service; on this an order may be made for the plaintiff to proceed as on a personal service (15 & 16 Vic. c. 76, s. 17; 1 Law Chron. 327, 328, 381).

VIII. *Process, special indorsement*.—A special indorsement may be made on a writ of summons of

the particulars of the plaintiff's claim in all cases where the defendant resides within the jurisdiction of the court, and the claim is for a debt or liquidated demand in money, with or without interest, arising upon a contract express or implied, as on a bill, note, cheque, or other simple contract debt, or on a bond or contract under seal for a liquidated sum, or on a statute where the amount is a fixed sum of money, or on a guarantee, where the claim against the principal is in respect of such debt, liquidated demand, bill, cheque, or note (15 & 16 Vic. c. 76, s. 25; 1 Law Chron. 385, 454).

IX. *Judgment on specially indorsed writ*.—In case of non-appearance to a specially indorsed writ, the plaintiff may file an affidavit of due service, or a judge's order for leave to proceed without personal service, with a copy of the writ, and thereupon sign judgment. Execution may be issued at the expiration of eight days from the last day for appearance (15 & 16 Vic. c. 76; 1 Law Chron. 812).

X. *Tender, what good and how avoided*.—To make a tender pleadable it must have been such that the party to whom it was made would not have been prejudiced by accepting the money (*Selw. N. P.* 158, 11th edit.; 3 Law Chron. 190; 1 Id. 62). It may be avoided by a subsequent offer to take the money, for the tenderor must be *tout temp prist et uncore prist* (1 Will. Saund. 33, n. 2; Will. Plead. 125, note; Key, Com. Law, 113).

XI. *New trial, assizes*.—Where a cause has been tried at the assizes, a motion for a new trial must be made within the first four days of the following term (*Emblin v. Dartwell*, 12 M. and W. 830; *Pract. Com. L.* 268; 1 Law Chron. 207).

XII. *Registering judgment*.—In order that a judgment of the superior courts may affect the lands of the judgment debtor, it should be registered with the senior master of the Court of Common Pleas; the registry should be renewed every five years (Key, div. Conveyancing, 150, 151; 1 Law Chron. pp. 20, 427—429; 2 Id. p. 416; 3 Id. 24).

XIII. *Irregularity—Waiver of*.—A person may be precluded from setting aside process, &c., for irregularity, by delay, and especially if he has taken a further step after knowledge of the irregularity, such as obtaining time to plead (*Reg. Gen. Hil. T.*, 1853, pl. 135).

XIV. *Attaching debt—Judgment creditor dead*.—The judgment creditor being dead, his representative should revive the judgment, and so make himself party to the proceedings. This may be done either by writ of revivor or by application to the court or a judge for leave to enter a suggestion on the roll (*C. L. P. A.*, 1852, ss. 129, 130; 3 Law Chron. 8). The proceedings are then had against the garnishee (3 Law Chron. 53, 158, 226, 325, 379).

XV. *Statute of Limitations—Debtor abroad.*—The absence beyond seas of a debtor (see as to creditor, 3 Law Chron. 91) from the accrual of the right of action prevents the Statute of Limitations from barring the claim. The creditor has the same time after the debtor's return as he would have had if the debt had then been incurred (*Fannin v. Anderson*, 9 Jur. 969; *Key*, Com. Law, 80; *Forbes v. Smith*, 1 Jur. N. S. 508; 2 Law Chron. 53; the part relating to a plaintiff being abroad is altered, see 3 Law Chron. 91).

EQUITY (*ante*, p. 194).

I. *Technical definition of equity.*—It is extremely difficult to give any exact definition of equity, particularly as the term "equity" is itself used in various senses by different writers. The only definition which appears to be intelligible with reference to the term "equity" as used in our courts of equity is the following:—Equity is a portion of justice or natural equity not embodied in legislative enactments, or in the rules of the common law, yet modified with a due regard thereto, and administered where the courts of law cannot, or originally did not, clearly afford any relief, or adequate relief, at least, not without circuity of action or multiplicity of suits, or where they cannot direct such restrictions, adjustments, compensations, qualifications, or conditions, as may be necessary, in order to take a due care of the rights of all who are interested in the property in litigation (see *Prin. Equity*, 6—12). So that, in fact, equity is a supplementary system, stepping in to supply the deficiencies of the law.

II. *Origin of equity jurisdiction.*—Very various opinions have been expressed by writers as to the origin of the equitable jurisdiction of the Court of Chancery, one being that it arose out of the introduction of uses of land, and the courts of law refusing to notice a use (see *Hay*, *Introd. Convey.* 29, 30, 40, 41, 4th edit.); but the more general opinion is, that it arose from the inability of parties who had sustained grievous outrages, such as assaults and trespasses, from persons who were screened from punishment by powerful subjects, or even public officers, so that the jurisdiction was first, as now, applied to remedy defects in common law proceedings (1 *Spence*, 326; *Story's Eq. Jurispr.* pl. 48, 49). Sir W. Blackstone, following Coke (4 *Inst.* 84), refers the equitable jurisdiction to fraud, accident, and confidence, which, if not all, was, he says, the chief portion (see another statement, 2 Law Chron. 406).

III. *Limits of power of court in early times; Year Book cases.*—Before the jurisdiction of the Court of Chancery was settled within its present limits, it was bounded by no certain limits or rules, but acted upon principles of conscience and natural justice, without

much restraint of any sort (1 *Story*, pl. 21). The decrees were rather in the nature of awards, formed on the sudden, *pro re nata*, with more probity of intention than knowledge of the subjects, founded on no settled principles, and not being intended for precedents (*Id.*; 3 *Black. Com.* 433, 440, 441). In the *Year Book*, 9 *Edw.* 4, 41, *Pigot, J.*, recognised the jurisdiction of the Court of Chancery to compel the production of deeds. In the *Year Book*, 9 *Edw.* 4, 14, No. 9, *Chancellor Stillington* said: "In the Chancery, a man shall not be prejudiced by mispleader, or for default of form, but according to the verity of the matter; we have to judge according to conscience *et non secundum allegata*." Sir J. Fineux (*Year Book*, 21 *Hen.* 7, fo. 41), said: "If one makes a bargain with me that I shall have his lands to me and my heirs for £20, and he refuses to perform it, I shall have an action on the case, and there is no occasion for a subpoena." In the *Year Book*, 21 *Edw.* 4, fo. 23, *Fairfax, J.*, said, the subpoena would not be so often used as it is now, if we entertained actions upon the case, and maintained the jurisdiction of this and other courts. Other, perhaps, more appropriate instances may be seen in *Crompton's Jurisdiction of the Courts*.

IV. *Judgments at law, fraud, equity.*—In the reign of James I., and in the time of Lord Ellesmere, a controversy arose as to whether a court of equity could give relief for or against a judgment at common law on the ground of fraud; Lord Coke was against, while Lord Ellesmere was in favour of, the Chancery jurisdiction. The King, with advice, gave judgment in favour of the equitable jurisdiction in such cases (1 *Wood. Vin. Lect.* l. 6, p. 186; 1 *Story*, pl. 51; 3 *Bl. Com.* 54).

V. *Former Chancellors.*—The following were some of the Chancellors who assisted to reduce the equitable jurisdiction into a regular system—viz., Lord Ellesmere, Lord Bacon, Lord Nottingham (called the "Father of Equity,"), and Lord Hardwicke, to whom alone all the greatest share of merit is ascribed (1 *Story*, pl. 52; 3 *Bl. Com.* 55).

VI. *Equity follows the law.*—The meaning of the maxim "*Aequitas sequitur legem*" is that equity is governed by legislative enactments and the rules of law in regard to legal estates, rights, and interests; and it is in this sense that it is said that equity cannot relieve contrary to a maxim of law (as that the eldest son shall inherit the father's lands to the exclusion of his younger brethren) or to a statute (3 *Black. Com.* 430); and in dealing with equitable estates, interests, and rights, equity is guided by analogy to legal estates, interests, and rights. But this rule is not followed where a superior equity intervenes, by reason of special circumstances which courts of equity feel bound to take notice of. And

in the cases of *executory trusts* (see vol. 1, p. 260), courts of equity allow modifications and constructions not permitted in executed trusts (1 Story, pl. 64, *et seq.*; 3 Wood. Vin. Lect. 480—482; 1 Fonbl. Eq. b. 1, ch. 3, s. 1; Com. Dig. tit. Chancery, C. 2, 3, F. 7, 8). Mr. Spence (vol. 1, pp. 409, 420, 421), after stating that no precise general rule as to the application of the maxim with all its qualifications can be given, and that where the remedy given by the Court of Chancery was founded wholly upon a principle of its own, and there was no corresponding course of procedure at law, there the court acted upon rules of its own, and refers, as illustrations, to assignments in trust for payment of debts, and to trusts created for the payment of debts, and by which the debts merely affected the lands by force of the trust, and to *devises* of lands for payment of debts.

VII. *Exclusive jurisdiction*.—The exclusive jurisdiction of the courts of equity comprises the guardianship which these courts possess over the person, and property of infants and lunatics, the peculiar protection they afford to married women, the superintendence they exercise over charities, the appellate jurisdiction of the Lords Justices in bankruptcy, and also such matters as statutory enactments have expressly confided to the administrative care of this tribunal. Those estates and interests which owe their very being to the doctrines of equity are necessarily the particular objects of the courts in which those doctrines are law (Smith's Manual, 6; Key, Equity, 6, 7; 2 Law Chron. 194, 195).

VIII. *Concurrent jurisdiction*.—The concurrent jurisdiction embraces those matters where courts of law, although they have general jurisdiction in the matter, cannot give adequate, specific, and perfect relief, or under the actual circumstances of the case, they cannot give any relief at all. The former occurs in all cases when a simple judgment for the plaintiff or for the defendant does not meet the full merits and exigencies of the case; but a variety of adjustments, limitations, and cross claims are to be introduced and finally acted on, and a decree meeting all the circumstances of the particular case, between the very parties, is indispensable to complete distribution of justice. The latter occurs when the object sought is incapable of being accomplished by the courts of law; as for instance, a preventive process to restrain trespasses, nuisances, or waste. It may, therefore, be said that the concurrent jurisdiction of equity extends to all cases of legal rights, when, under the circumstances, there is not a plain, adequate, and complete remedy at law. Such are, injunctions, specific performance of contracts, discovery, account, administration of assets, partnerships, winding-up companies, dower, partition,

confusion of boundaries, fraud, accident, and mistake, &c. (3 Black. Com. 431; 1 Fonbl. Eq., b. 1, ch. 1, s. 3; 1 Story, ch. 3; Key, Equity, pp. 5, 6; 2 Law Chron. 195).

IX. *Auxiliary jurisdiction*.—The auxiliary jurisdiction of equity is exercised to prevent parties proceeding at law from taking an inequitable advantage of some circumstances which a court of law could not consider, in directing the cancellation or delivering up of documents, and the remedy it affords to suitors, by the proceedings known as bills *quia timet*, bills of peace, bills for the perpetuation of testimony, and bills of interpleader; in some of these matters, the jurisdiction is not exercised simply in aid of proceedings in any other court, but for the furtherance of justice in causes which are pending in the Court of Chancery itself (1 Story, ch. 3; Key, Equity, 4).

X. *Construction of statutes*.—Courts of equity construe statutes in the same manner as courts of law do, and they cannot depart from the terms any more than courts of law. Both sorts of courts are bound to interpret statutes according to the true intent of the Legislature, as expressed in the statutes—as Mr. Justice Blackstone says (3 Com. 431), there is not a single rule of interpreting laws, whether strictly or equitably, that is not equally used by the judges in the courts of law and equity (1 Story, pl. 15, 94; Bacon's Abr. Chancery, C.; 3 Law Chron. 390).

XI. *Administrative and judicial jurisdictions*.—The administrative jurisdiction, answering, as we understand the question, belongs to the Chancellor, and not to the Court of Chancery, as such. These are as keeper of the Sovereign's conscience, visitor of hospitals and colleges of royal foundation, patron of the Sovereign's livings under a certain value, Speaker of the Lords, and general adviser of the Sovereign in the capacities both of a privy councillor and member of the Cabinet. The examiners may have meant the question to refer to the latter alone. The judges of the court, as a judicial tribunal, are the Lord Chancellor, the Master of the Rolls, the Lords Justices, and the three Vice-Chancellors (Princ. Eq. 12—14).

XII. *Courts of appeal*.—From the decrees of the Vice-Chancellors and the Master of the Rolls an appeal lies to the Court of Appeal; from thence to the House of Lords. If it is intended to appeal to the justices, a caveat should be entered against the enrolment of the Vice-Chancellor's decree, otherwise no appeal can be had except to the Lords (14 Jur. 238). After the decree is drawn up, a petition of appeal, signed by two counsel, must be presented, and a deposit of £20 made. The order for leave to appeal, after it is passed and entered, is served on

the solicitor of the opposite party. The appeal is then set down and argued in its turn. Where the decision complained of was made on a motion, application is made at once to the appeal court to vary or discharge the order. If there is a further appeal to the Lords, a petition of appeal must be prepared signed by two counsel, and presented, and notice given. The order to answer must be served on the respondent, who then puts in his answer. The appellants enter into a security to the extent of £400. After the answer is put in, either party may apply to have the cause appointed for hearing, and each party prepares and delivers copies of his case and appendix. On the day appointed, or as soon after as convenient, the matter is argued, and either then or subsequently judgment is delivered (Pract. Eq. 883—889).

XIII. Appeals to Lords.—The first direct petition of appeal from an equity decree, and the first order of the Lords, reversing an equity decree upon such petition, without any authority delegated to them by the Crown, are stated by Lord Hale to be in the year 1640, during the sitting of the Long Parliament in the time of the Commonwealth (2 Law Chron. p. 103). Blackstone and some other writers refer the origin back to the reign of James I., but these appeals were under a writ or other direction from the Crown (Id.; 3 Black. Com. 354).

XIV. Suit, steps in.—A suit for specific performance is usually instituted by bill, but in plain cases it may be commenced by a claim. The bill being printed and filed, a copy is served on the defendant; if an injunction, &c., is required, a written copy bill may be filed (3 Law Chron. 390). The defendant appears and answers the bill. The plaintiff either files a replication, and enters into evidence, or gives a notice of a motion for a decree, having previously filed his affidavits (3 Law Chron. 284). In some cases a motion is made to refer the title, if in dispute. Afterwards the cause is set down. Briefs are delivered, the matter is argued, and judgment given. If the decree is to refer the title, the necessary proceedings are had in chambers, and the abstract is laid before the conveyancing counsel, after which the clerk makes his certificate, and the cause being set down for further consideration, a final decree is made, which is afterwards drawn up in proper form (see 3 Law Chron. 390, 391, Nos. IV. and XIII.). The decree is enforced by writ of attachment, serjeant-at-arms, and sequestration, or by writ of assistance. For costs, the writ of *feri facias* or *elegit* may issue (3 Law Chron. 391, No. XV.).

XV. Leases by tenants for life—Waste.—By the Leases and Sales of Settled Estates Act (the 19 & 20 Vic. c. 120; 3 Law Chron. 105—111), the Court of Chancery is authorised, where it is deemed proper

and consistent with a due regard to the interests of all parties entitled under the instrument of settlement, to permit tenants for life, whether impeachable or not of waste, to grant agricultural or occupation leases for twenty-one years; mining leases for forty years, building leases for ninety years, and where there is a custom for even longer terms. This may be done, though it should involve the committal of waste, where the tenant is impeachable of waste, assuming that the settlor had power to grant that privilege (secs. 1, 10; 3 Law Chron. 106, 107).

BANKRUPTCY (*ante*, p. 194).

I. Acts of bankruptcy.—The following acts, when committed by a person who trades within the meaning of the bankrupt laws, are acts of bankruptcy:—

1. Departing this realm.
2. Being out of it and remaining abroad.
3. Absenting himself from his dwelling-house.
4. Beginning to keep his house.
5. Suffering himself to be arrested or taken in execution for any debt not due.
6. Yielding himself to prison.
7. Suffering himself to be outlawed.
8. Procuring himself to be arrested or taken in execution.
9. Procuring his goods or chattels to be attached or taken in execution.
10. Fraudulent grant or conveyance of lands or chattels within this realm or elsewhere.
11. Fraudulent surrender of any of his copyhold lands or tenements.
12. Fraudulent gift or transfer of goods or chattels.

But it is an essential ingredient in each of these acts that it should be done or suffered *with intent to defeat or delay his creditors* (12 & 13 Vic. c. 106, s. 67). Further, if a trader, when arrested or imprisoned for debt, shall be in prison for twenty-one days and not discharged, or when arrested or detained for debt shall escape out of custody, he shall be deemed to have committed an act of bankruptcy. Also when, after the filing against him of any petition for adjudication of bankruptcy, he shall collude or make a private arrangement with the petitioning creditor, so as to give him a preference over the others; or where a trader in actual custody shall petition the Insolvent Debtors' Court for his discharge therefrom (s. 74). Also, if he fail to appear to the summons of any creditor who will make affidavit of his debt in the Court of Bankruptcy, or refuse to make the admission, and yet decline to swear that he believes himself to have a good defence upon the merits. Also, if he does not pay or compound for a judgment debt within seven days after a notice in writing from the creditor, or seven days after notice of a peremptory order made in any court of equity, or in any matter of bankruptcy or lunacy, for payment of any sum, or if a petition filed for arrangement between himself and his creditors is dismissed.

II. *Sale of merchandise, no trading.*—A party may, without subjecting himself to the bankrupt laws, sell articles of merchandise where he has no general intention to get his living by such means (1 Rose, 84, 402; 1 Term Rep. 572). So where he is an infant (9 Bing. 865), or where an executor or trustee merely sells off the stock in trade of the deceased (1 Atk. 102; Harr. and Edw. N. P. 652, 653). Where the goods sold have not been purchased with the intent to be sold, the sale of them will not render the party subject to the bankrupt laws. Thus if a man purchase goods for his own use, that will not make him a trader, even though he afterwards sells such of them as he may not have occasion for (Summerset v. Jarvis, 6 Moore, 56; Exp. Cromwell, 1 Mont. Desc. and De Gex, 158). So where a man sells the produce of his lands, &c., he will not be a trader (Henley's Bankr., p. 4, 3rd edit.; see *ante*, p. 14, for fuller answer).

III. *Acts of Bankruptcy, voluntary and compulsory.*—The following acts of bankruptcy (among others) may be considered voluntary—namely, 1, a trader's departing from his dwelling-house, or the realm, or otherwise absenting himself; 2, his beginning to keep house or remaining abroad; 3, procuring or suffering himself to be arrested, or taken in execution; 4, making a fraudulent conveyance, gift, &c., of his lands, goods, or chattels. The preceding acts must be done with intent to defeat or delay creditors (2 Steph. Com. 139, 2nd edit.); but the following do not depend upon proof of intention; 5, so, lying in prison for twenty-one days or escaping or filing a petition in the Insolvent Debtors' Court, or making a private arrangement with the petitioning creditor after docket struck, are acts of bankruptcy. A trader may (unless he does what is required of him) be compelled to commit an act of bankruptcy by a judgment creditor, or a creditor under a decree or order of a court of equity, giving him a notice to pay the money due thereon immediately; after seven days non-compliance it is an act of bankruptcy (12 & 13 Vic. c. 106, ss. 72, 73). So any other creditor (*i. e.*, one not having obtained a judgment, decree, or order) may give notice requiring immediate payment, verifying his debt by affidavit, in which credit should be given for any set off, and then summon the debtor, who if he does not attend the summons, and does not pay, secure, or compound for such demand, or (if required) give a bond with two sureties, or if he attends, refuses to admit the demand, and does not depose to a good defence, and (if required) enter into a bond as aforesaid, will commit an act of bankruptcy on the eighth day after service of the summons (12 & 13 Vict. c. 106, ss. 78, 80). The same result will arise where the trader signs an admission of the debt, and does not within

seven days pay, &c., the creditor (s. 81). And s. 82 provides for the case of an admission of *part* of the debt, as to which see *Oldfield v. Dodd* (17 Jur. 261).

IV. *Time of act of bankruptcy.*—No person is liable to be made a bankrupt by reason of any act of bankruptcy committed more than twelve months prior to the filing of any petition for adjudication against him. This is so expressly provided in sec. 88 of the Consolidation Act.

V. *Requisites for adjudication.*—The requisites to support for adjudication are—(1) a trading; (2) an act of bankruptcy; (3) a petitioning creditor's debt to a sufficient amount, unless where the trader himself petitions (2 Chron. 213).

VI. *Joint-stock company, adjudication.*—In order to obtain an adjudication of bankruptcy against a joint-stock company, a creditor not having a judgment, &c., must (7 & 8 Vic. c. 111, s. 7) file an affidavit of debt, of a proper amount, in a court of law, and sue out a writ of summons, which must be served on the chief clerk, &c., of the company. If the company do not, within one calendar month, pay, &c., such debt, or make it appear to a judge that it is their intention to defend the action upon the merits, and enter an appearance accordingly, the company will be deemed to have committed an act of bankruptcy (see *Exp. Gillett*, 28 Law Tim. Rep. 68, 53; 3 Law Chron. 187, 193, 254, 267, 333). By ss. 5 and 6, creditors having a judgment or decree, &c., may serve a fourteen days' notice requiring payment. So by s. 4, the company itself may resolve that it is unable to meet its engagements, and that shall be an act of bankruptcy.

VII. *Second bankruptcy.*—The certificate of a person who has been before bankrupt, and has not paid fifteen shillings in the pound, will only protect his person, leaving his future property subject to the claims of the assignees (1 Law Chron. 334; Key, Bankruptcy, p. 132).

VIII & IX. *Debts to petition and for proof.*—These questions seem to relate to the same matters, and are, therefore, answered in one. The debt of a creditor seeking to prove may have been contracted after the debtor ceased to trade, whereas a debt of a petitioning creditor contracted after the trading ceased will not support a fiat (*Meggott v. Mills*, 1 Ld. Raym. 286; 1 Swanst. 64). The debt of the petitioning creditor must have been contracted (though it need not be payable) before the act of bankruptcy, but a creditor may prove his debt, if *bonâ fide* contracted before the filing of the petition, notwithstanding a prior act of bankruptcy (see 12 & 13 Vic. c. 106, s. 165; *Robinson v. Vale*, 2 Barn. and Cres. 762; 3 Barn. and Ald. 13; 1 Bing. 180). An equitable debt will not support an adjudication, but a creditor may prove for an equitable demand (*Walcot*

v. Hall, 2 Bro. Chan. Cas. 306; Rex v. Eggington, 1 Term Rep. 369; Mont. and Ayrt. Bankr. Pract. p. 163, 1st edit.).

X. *Proof—Separate creditors—Joint adjudication.* Where the whole of the members of a firm are made bankrupt, and their joint assets are not sufficient to discharge the joint liabilities, the joint creditors may prove against the separate estate of one of the partners, but will not be entitled to receive any dividends until the separate creditors of that partner have been fully satisfied. Separate creditors cannot receive dividends out of the joint estate until all the joint creditors have been satisfied. This subject is very confusedly noticed in the text books, and is made more difficult of comprehension by being mixed up with joint and separate adjudications (*fiats*), but if the reader will turn to Exp. Cook (2 P. Williams, 500, 501), Horsey's case (3 Id. 25), and Exp. Rowlandson (3 Id. 408), he will find an intelligible explanation. The 12 & 13 Vic. c. 106, s. 140, relates to a separate *adjudication* (*fiat*) against one or more of several partners, the others of whom may be solvent (see Exp. Peake, 2 Rose, 44; Archb. Bankr. 427, 8th edit.). The 140th section enacts that if one or more of the partners of a firm be adjudged bankrupt, any creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall be entitled to prove his debt, for the purpose only of voting in the choice of assignees, and of being heard against the allowance of the bankrupt's certificate, or of either of such purposes; but such creditors shall not receive any dividend out of the separate estate of the bankrupt until all the separate creditors shall have received the full amount of their respective debts.

XI. *Surety—Proof.*—Any person who is surety or liable for any debt of the bankrupt if he has paid the debt, or any part thereof, in discharge of the whole debt, if the creditor has proved his debt, is entitled to stand in the place of such creditor as to the dividends, &c., or, if the creditor has not proved, such surety, or person liable, is entitled to prove as a debt, not disturbing the former dividends. This is by virtue of sec. 173 of the Consolidation Act (see Steadman v. Martinnant, 13 East, 427; Wallis v. Swinburne, 17 Law Journ. N. S. Exch. 169; Wise's Bankr. 107).

XII. *Assignees—Choice.*—Assignees of the bankrupt are chosen at the first public sitting, or at an adjournment thereof, and all creditors who have proved debts to the amount of £10 may vote in such choice. Any creditor may vote in person, or by any person by him authorised by letter of attorney, on proof of the execution thereof, either by affidavit or by oath before the Court *vivâ voce*; the affidavit of execution may be sworn before the Court,

or any Commissioner, Registrar, or Master thereof, or before a Master in ordinary or extraordinary in Chancery, or before any clerk of affidavits, assistant clerk, or second assistant clerk of affidavits in Chancery; in the case of creditors residing in Scotland or Ireland, the affidavit may be sworn before a Master extra or magistrate; or elsewhere (not being in England) by oath before a magistrate, duly attested by a notary public, &c., or before a British Minister, &c. (12 & 13 Vic. c. 106, s. 243). Two creditors may join in the power, which does not require a stamp (12 & 13 Vic. c. 106, s. 138).

XIII. *Assignees—Property vesting.*—Until the appointment of assignees and their election (where such is necessary) to take the property, the estate (except where a provisional assignment was executed) was formerly in the bankrupt; but, as by sec. 40 of the Consolidation Act, the official assignee is to be deemed, to all intents and purposes, the sole assignee of the bankrupt's estate and effects until the appointment of the creditors' assignees, it seems to follow that, until such appointment, the estate and effects of the bankrupt (except copyholds, estates tail and leaseholds) are vested in the official assignee (see Turner v. Nicholls, 16 Sim. 565; S. C. 18 Law Journ. N. S. Chanc. 278; 18 Jur. 298). On the appointment of creditors' assignees and their election to take (where necessary), their title attaches (jointly with the official assignee), and has a retrospective operation; that is, relates back to the time when the trader became bankrupt, so as to overreach and annul all intervening alienations and executions, except so far as against the Crown, and also except such alienations and dealings as are by the Consolidation Act rendered valid (Mann v. Ricketts, 9 Jur. 1103; Princ. Com. Law, 108—11). By the mere appointment, and without any other conveyance or assignment, all the bankrupt's property (except copyholds, estates tail, and leases before assent) is transferred to the assignees (12 & 13 Vic. c. 106, ss. 40, 102, 141, 142; 1 Bing. N. C. 813; 2 Black. Com. 486; 2 Steph. Com. 207). The transfer as to *freeholds* does not operate *retrospectively* (2 M. and Selw. 446).

XIV. *Reputed ownership, none.*—The following are some instances where goods in the bankrupt's possession or control at the time of the bankruptcy do not pass to the assignees—where the bankrupt has property in his possession in *autre droit*, as where he is a trustee, or executor, or administrator (Winch v. Keeley, 1 Term Rep. 619; Exp. Ellis, 1 Atk. 101). So property in his possession as factor for another, will not pass to the assignees (2 P. Will. 187, note; Cowp. 233). Nor will property placed in the bankrupt's hands for a specific purpose (Exp. Froud, 1 Mont. & Mc Ar. 262). So moneys, secu-

rities, and effects, belonging to properly inrolled friendly societies, &c., do not pass to the assignees (6 Madd. R. 98; Exp. Ray, 2 Deac. 537). So goods obtained by fraud (15 Mees. and Wels. 216), or in the trader's possession in conformity with the known usages of trade (16 Mees. and Wels. 212), and goods settled to the separate use of the wife (16 Mees. and Wels. 838), do not pass to the assignees—i. e., they cannot be sold under a commissioner's order.

XV. *Assignment of policy.*—Where a trader assigns a policy of insurance on his life, notice thereof should be given to the insurance office, to prevent the same being considered as in his reputed ownership (see 2 Law Chron. 339; 3 Id. 37; Edwards v. Scott, 1 M. and Gr. 962; Re Pearce, 1 Jur. N. S. 385).

CRIMINAL LAW (*ante*, p. 195).

I. *Criminal courts.*—The following are the several English criminal courts:—1. The House of Lords, as the court of appeal on writs of error, and as original jurisdiction by impeachments, and trials of peers for treason or felony. 2. The Court of Queen's Bench, which, on the Crown side, has jurisdiction (primary and by way of appeal) over all offences, except treason or felony by a peer (4 Black. Com. 312; Com. Dig. Court., B). 3. The Central Criminal Court (*ante*, p. 16) having jurisdiction over offences committed on the high seas where the prisoner is in Newgate, and all felonies and misdemeanors committed in London, Middlesex, and certain suburbs in parts of Essex, Kent, and Surrey, and offenders sent under the 19 & 20 Vic. c. 14, stated 3 Law Chron. 172, 173. 4. The Quarter Sessions having jurisdiction to try misdemeanors, and a few felonies not punishable (on first conviction) by penal servitude for life, and not being expressly excluded from their jurisdiction by the 5 & 6 Vic. c. 38, s. 31 (stated *ante*, p. 16).

II. *Steps in a criminal prosecution.*—The earlier steps have been so fully stated (*ante*, p. 18, No. X.), that we think it unnecessary to repeat them here. It may be added that the prosecutor's solicitor should, if the prisoner is admitted to bail, satisfy himself of their responsibility, obtain a copy of the depositions of the witnesses, take care that those witnesses who are bound over should be informed when the trial will come on, and subpoena any other witnesses who may be able to give material evidence. He should then prepare a brief for counsel, with copies of the indictment (which in difficult cases should be settled by counsel) and of the depositions, and attend the court on the day of trial. If the prisoner is convicted, the judge forthwith or at a

subsequent time passes sentence. An alien may be tried by a jury, one-half of whom are foreigners (Key, Crim. Law, pp. 110, 111).

III. *High Treason.*—High treason, in a general sense, is an offence against that allegiance which is due to the Queen from every man who lives under her protection; and it is so called by reason of the greatness of the personage against whom it is committed (Bacon's Abr. tit. "Treason;" 4 Steph. Com. 210, 2nd edit.). As the crime of petit treason no longer exists, it seems unnecessary to use the word "high" before treason in order to express the crime originally properly designated high treason. The following are some instances of treason—namely, compassing the Sovereign's death, levying war against the Sovereign, adhering to the Sovereign's enemies, counterfeiting the great or Privy Seal, &c. (see 11 & 12 Vic. c. 12; 4 Black. Com. ch. 6; 4 Steph. Com. ch. 6; Key Criminal Law, pp. 20, 21).

IV. *Homicide.*—Homicide is the general term for any manner of killing a human being. Homicide is either justifiable, excusable, or felonious. Justifiable is where death arises in preventing the commission of any forcible and atrocious crime, or where an officer kills an offender in the execution of his office, or of process, when resisted. Homicide is excusable where done in necessary self-defence, or where the death is caused by a lawful act without negligence. Felonious homicide includes murder (also self-murder) and manslaughter. Both these killings are unlawful, but murder is done with malice prepense, whilst manslaughter is without malice (First Book, 384—387; 4 Steph. Com. c. 4, p. 120—154, 2nd edit.).

V. *Murder, indictment, instrument.*—Formerly an indictment for murder must have declared how and with what it was done—namely, *with a certain sword, &c.*; yet, if the party were killed with another weapon, it maintained the indictment; but if it were with another kind of death, as poisoning or strangling, it was held not to maintain the indictment. So it was held that if a man were indicted for the murder of another with a sword, pistol, &c., the indictment must have set forth in which hand the defendant held the weapon, though mistaking the hand would not have vitiated (2 Hawk. Pl. C. 185; 3 Com. Dig. 505; Archb. Crim. Plead. and Evid. 403, 404, 8th edit.). Now, however, the means by which the injury was inflicted need not be specified in indictments for murder or manslaughter (14 & 15 Vic. c. 100, s. 4). The only question, therefore, will be—Is the accused guilty or not of murdering the deceased? and evidence of any kind of killing, whether by poisoning, beating, starving, or drowning will be admissible.

VI. *Homicide, punishment.*—Punishable homicide is either manslaughter or murder; for the former, the punishment is penal servitude for life, or for not less than seven years; or imprisonment for not more than four years, or fine. For murder the punishment is death.

VII. *Burglary, definition, evidence.*—Burglary is where one by night breaks and enters into another's dwelling house with intent to commit a felony. Burglary, therefore, must be, first, in the *night time*, that is, by 7 Will. 4 and 1 Vic. c. 86, s. 4, after nine of the clock in the evening, and before six of the clock in the morning; secondly, the crime must be committed in a mansion or dwelling-house, or in a building communicating therewith. For by 7 & 8 Geo. 4, c. 29, s. 13, no building, although within the same curtilage with the dwelling-house, shall be deemed part thereof for the purpose of burglary, unless there shall be a communication with such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from one to the other; thirdly, there must, in order to make it burglary, be both a breaking and an entry to complete it, or a breaking out after an entry to commit felony, or being therein and committing a felony (7 & 8 Geo. 4, c. 29, s. 11); fourthly, the breaking and entry must be with a felonious intent (4 Black. Com. 224, *et seq.*; 4 Steph. Com. 172—178).

VIII. *Burglary, curtilage.*—A curtilage is stated by Cowell to be a piece of ground lying near, and belonging to, a dwelling-house, as a court-yard, or the like. What is meant by breaking and entering a building within the curtilage of a dwelling-house will be best understood by a statement of the provisions of secs. 13 and 14 of the 7 & 8 Geo. 4, c. 29. By the 13th section no building, although within the same curtilage with the dwelling-house and occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary, *unless there be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other.* Section 14 (amended by 1 Vic. c. 86 and 90), enacts, that if any person shall break and enter any building, and steal therein any chattel, money, or valuable security, such building being *within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof according to the provisions of the above 13th section, every such offender being convicted thereof, either upon an indictment for the same offence or upon an indictment for burglary, house-breaking, or stealing to the value of five pounds in a dwelling-house, containing a separate count for such offence, shall be liable at the discretion of the court to be transported beyond the*

seas for any term not exceeding fifteen years, or to be imprisoned for any term not exceeding three years, to which imprisonment, hard labour and solitary confinement may be superadded.

IX. *Forgery and Uttering.*—Forgery is the fraudulent making or alteration of a writing to the prejudice of another man's right, with a view to put it off as a genuine document, so as to defraud some one (Reg. v. Marcut, 2 Car. and Kirw. 356); but by s. 8 of the 14 & 15 Vic. c. 100, the intent to defraud particular persons need not be alleged or proved. It was a misdemeanor at common law, and was punishable with fine and imprisonment only; but now, by statute, it is in many cases felony (Clarke v. Newsam, 1 Exch. Rep. 131), and punishable with transportation or imprisonment (4 Steph. Com. 205, *et seq.*, 2nd edit.). The uttering of a forged instrument, the forgery of which is only a forgery at common law, is no offence, unless some fraud was actually perpetrated by it (Reg. v. Boulton, 2 Car. and Kirw. 604).

X. *Embezzlement and Larceny.*—Embezzlement is where one in a public trust, or as a servant, receives and fraudulently appropriates money or goods received for public purposes or for his master, without the same having been in the possession of the party entitled thereto (Dickinson's Quart. Sess. 261, 355, 5th edit.; 3 Law Chron. 267). Embezzlements by persons employed by the party whom they defraud are distinguished from larceny properly so called (see definition, 14 Jur. Dig. 54), as being committed in respect of property which is not at the time in the actual or legal possession of the owner (Reg. v. Butler, 2 Car. and Kirw. 340; Reg. v. Aston, 2 Id. 413; Reg. v. Hawkins, 14 Jur. 513; 1 Law Chron. 442). The distinction in such cases between larceny and embezzlement is by the 14 & 15 Vict. c. 100, s. 13, rendered of no practical importance, as now a person indicted for embezzlement as a clerk, &c., is not to be acquitted if the offence turn out to be larceny, and *vice versa*.

XI. *Receiving stolen goods—Evidence.*—In order to sustain an indictment for receiving stolen goods, it must first be proved that a larceny of the goods mentioned in the indictment was committed; next, that the stolen goods were received by the defendant; and, lastly, that the accused at the time of the receipt of the goods knew or had reason, from the circumstances, to suspect that the goods were stolen (Archb. Pl. & Ev. 268, 269, 8th edit.).

XII. *Perjury defined—Witnesses.*—Perjury is the crime of false swearing which arises when a lawful oath is administered in some judicial proceeding, to a person who swears wilfully, absolutely, and falsely, in a matter material to the issue or point in question. The law takes no notice of any perjury but such as

is committed in some court of justice having power to administer an oath; or before some magistrate, or proper officer, or person, invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution (4 Black. Com. 187). The 14 & 15 Vic. c. 99, s. 16, authorises every court, judge, justice, officer, commissioner, arbitrator, or other person having by law or by consent of parties authority to hear, receive, and examine evidence, to administer an oath to all such witnesses as are legally called before them respectively. It is a misdemeanor. In order to obtain a conviction two witnesses are, in general, required (4 Bl. Com. 358; Archb. Crim. Pl. and Ev. 155, 568, 8th ed.; Key, Crim. Law, pp. 52, 53; 1 Law Chron. 133, 269, 386; 3 Id. 217, 412; *ante*, p. 18).

XIII. False representation—Nature of.—In order to constitute the offence of obtaining money or property by false pretences, the representations (which need not necessarily be in words, but arising from conduct and acts) must be both alleged and shown to have been made with intent to cheat or defraud, and formerly some particular person must have been named and proved to have been so cheated or defrauded; but this is rendered unnecessary by s. 8 of the 14 & 15 Vic. c. 100). Thus, A. may be indicted for obtaining goods on a fraudulent pretence under the 7 & 8 Geo. 4, c. 29, s. 53; on which statute it has been held, that it is not necessary that the pretence should be in words; the conduct and acts of the party will be sufficient, without any verbal representation (see *Rex v. Jackson*, 3 Camp. 370; *R. v. Barnard*, 7 Car. & Pay. 784, the case of a person wearing a student's gown and cap).

XIV. Punishment of frauds by trustees and others.—By the 20 & 21 Vic. c. 54 (stated *ante*, p. 154—156) trustees fraudulently disposing of or destroying the trust property *causa lucri* are guilty of a misdemeanor (s. 1). So bankers, merchants, brokers, attorneys, agents, or persons acting powers of attorney, fraudulently selling, pledging, &c., property intrusted to them for safe custody, are guilty of a misdemeanor (ss. 2, 3). By s. 4, bailees fraudulently converting the bailed property to their own use are guilty of larceny. Secs. 5—8 apply to directors and officers, &c., of public companies who are guilty of a misdemeanor, in fraudulently appropriating the company's property, or in keeping fraudulent accounts, or wilfully destroying books, &c., or publishing fraudulent statements with intent to deceive any shareholder, &c., or to induce any person to become a shareholder, &c. By s. 9, persons receiving property fraudulently disposed of, knowing the same to have been so, are guilty of a misdemeanor.

XV. Criminal information, what, and leave to file.

—A criminal information is a mode of proceeding, in lieu of an indictment, in respect of gross and notorious misdemeanors, as for libelling or obstructing magistrates in the discharge of their duties, for bribery, riots, batteries, libels, provoking to breach of the peace, &c., and even for the non-repair of roads (11 Jur. 306). Leave to file a criminal information is obtained, the rule being *nisi* only in the first instance by application (by counsel only) to the Court of Queen's Bench upon affidavits stating the circumstances upon which the complainant seeks to proceed by this extraordinary method. These must not only charge the defendant with such a crime as will justify the court in interfering, but must, in general, show the innocence of the party complaining, and that his motives are honourable and sincere. Where an information is sought against a magistrate a notice of the motion should be given, and the motion must be made within two terms at least, and early enough to allow of cause being shown before the end of such second term. And even in the case of a private individual, the complaint should be made as early as possible, and any delay should be accounted for (2 Barnard. 284; 4 Term Rep. 465, 290; 1 Chit. Crim. Law, 856, 875; Reg. v. Saunders, 10 Qu. Ben. Rep. 484).

SUMMARY OF DECISIONS.

EQUITY AND CONVEYANCING.

ANNUITY.—*Memorial* [vol. 3, p. 242, vol. 1, pp. 150, 363—366—*Income-tax reduction.*—A memorial of an annuity subject to income-tax is not defective for not noticing a proviso in the deed that any future reduction of income-tax shall enure to the benefit of the grantor. *Knight v. Bowyer*, 6 Week. Rep. 28.

CHAMPERTY [vol. 2, p. 367]—*Buying an incumbrance.*—It is not necessarily champerty to buy an incumbrance which is the subject of a suit in equity. *Knight v. Bowyer*, 6 Week. Rep. 28.

CONVERSION INTO PERSONALTY [vol. 3, pp. 34, 369]—*Option to purchase by a lessee.*—Where a vendor is either absolutely or contingently under such an agreement to sell as equity will enforce against him, the property (as between his real and personal representatives) forms part of his personal estate from the time fixed for completion (*Dart's Vend.* 170, 3rd edit.). In cases where the right to purchase is exercisable at the option of a lessee, considerable inconvenience may seem to follow from deciding that the money is personalty, since it is clear that a devisee of real estate may be in possession of the rents for many years, and then be liable to

lose the estate altogether, upon the exercise of an option by the lessee. The question, however, has been expressly decided, first, by Lord Kenyon, in *Lawes v. Bennett* (1 Cox, 167), and then by Lord Eldon, in *Townley v. Bedwell* (14 Ves. 590). It is true that Lord Eldon expressed some doubt about it. His Lordship, in referring to *Lawes v. Bennett*, said, "The case was very much argued; and I do not mean to say that a great deal may not be urged against it; but where there is a decision precisely in point, it is better to follow it." Lord St. Leonards, in his work upon Vendors and Purchasers, has assumed that the above cases are law. In the following case it appeared that under an agreement to lease real estate, the tenant was to have the option of purchasing the premises at the expiration of the term, or sooner if the lessor should wish to dispose thereof. The lessor died, and at the expiration of the term the lessee claimed to be entitled to a conveyance, which was executed: Held, that the realty was converted, and the purchase-money belonged to the personal representatives of the lessor. *Collingwood v. Row*, 26 Law Journ. Ch. 649.

COVENANT TO SETTLE, &c.—*Construction—Marriage settlement—Covenant to settle after-acquired property* [vol. 3, p. 135]—If a man contracts to convey, to mortgage, or to settle an estate, and he has not at the time of his contract a title to the estate, but afterwards acquires such a title as enables him to perform his contract, he is bound to do so. But a covenant to settle land which the covenantor should succeed to under a will, does not bind him to settle whatever interest he might derive *aliunde* in the same land. *Smith v. Osborne*, 6 Week. Rep. 21.

DECREE.—*Rectifying error in mistake in chief clerk's certificate, and decree founded thereupon—Right to rectification—Mode of proceeding.*—Where in the course of the proceedings in a suit an error is committed by the parties themselves, and decrees of the court have been made founded on such error, there necessarily occurs much difficulty in having the error rectified in strict form. Lord Langdale, in his judgment in *Davenport v. Stafford* (8 Beav. 522), said, "It is clear that if a party has been induced by fraud to consent, or has by mistake consented to a decree, the court has the power to relieve him, and will do so, on being satisfied that the fraud or mistake existed, if the conduct of the party himself has not deprived him of his title to relief, and that the relief can be given with due regard to the just interests of others. I doubt whether the form of proceeding in such cases is strictly settled, or whether the same form is exclusively applicable to all cases." In some cases the error may be amended on a re-hearing, but more usually on original bill. In the following case, it appeared that by a decree of

the court made in another suit, in which the present plaintiff was defendant, and the present defendant was plaintiff, the residuary personal estate of a testator was declared to be divisible into moieties, to one of which the present plaintiff was entitled, and the present defendant to the other, and the chief clerk was ordered to ascertain the residuary personal estate not specifically bequeathed. Instead of having the residue ascertained by the chief clerk, the parties undertook to state for themselves what the particulars were, and the chief clerk made his certificate, by which he certified that the residuary estate was admitted by the parties to consist of certain particulars. A decree on further consideration was made at chambers on this admission, and various payments and transfers were made in pursuance of the decree. Afterwards, the present plaintiff having discovered that a great mistake had been made in the amount of residue stated in the certificate, owing to which the present defendant had been overpaid, filed the present bill, alleging the mistake, and praying that the defendant might be decreed to recoup and pay him the sum which he had received in excess. The court being satisfied that a mistake, as alleged, had really been made, and that the case was free from the objection of delay, also that the conduct of both parties had been such as not to have deprived the plaintiff of his right to be relieved, and that the rights of third persons would not be invaded by any interference, held itself bound to interfere in the plaintiff's behalf. The question of mistake or no mistake, where the alleged error occurs in the progress of proceedings in the face of the court, can never be so fairly stated or tried as by original bill. The court, however, refused to make an order in the terms prayed, but gave the present plaintiff leave to move to vary the certificate in the former suit, and to present a petition of re-hearing of the cause on further consideration, upon payment of costs up to the hearing. *Purcell v. Manning*, 30 Law Tim. Rep. 50.

DEVISE.—*Construction—Void devise—7 Will. 4, and 1 Vic. c. 26, s. 25—Residuary devise—Difference between gift by way of exception, and one in the nature of a charge.*—By section 25 of the Wills Act (7 Will. 4, and 1 Vic. c. 26), it is enacted that, "unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will." Upon the literal construction of the language of this section, it might, at first sight,

seem that a testator who assumes to devise part of his land for purposes which from their nature render such devise ineffectual, has expressed "a contrary intention," so far as regarded the claim of his residuary devisee. Such a view of the matter is however at once met by the fact that the clause in question expressly includes in its operation devises which might fail or be void by reason of being contrary to law, or otherwise incapable of taking effect. The prevailing opinion was, that the Legislature, by the enactment just referred to, intended to assimilate residuary devises of real estate to residuary gifts of personal property. It had long been established that a general residuary gift includes every legacy which failed by lapse. The case of *Cooke v. The Stationers' Company* (3 Myl. and Ke. 262) shows the distinction between a gift by way of exception, and one in the nature of a charge. It was there held that when the residuary gift was not of the produce, but of the corpus of real estate, then if a gift intended for a particular purpose, which failed, was to be considered as an exception from the residuary gift, the heir would take; if it were to be considered as a charge upon the devised estate, the residuary legatee would be entitled to the benefit of the failure. It has been fully established by recent cases, that the 25th section of the Wills Act is to be construed upon the principle of assimilating a residuary devise of real estate with a like bequest of personalty. These observations will explain the following case and decision:—*H. C.*, in 1854, gave to trustees, their heirs, &c., all his real and personal property, of whatever nature or kind, in trust for his sister *S. C.* The testator then directed that certain farms should be sold, and the money obtained, together with moneys due to him, should be vested in the names of the treasurers of the Wesleyan Methodist Missionary Society on annuity such as the law directed, such annuity to be paid to his sister *S. C.*, as she might direct. After the decease of a brother, and another sister, and *S. C.*, the claim to the annuity was to cease: Held, that the testator had given his property of every description upon trust for one particular person, and everything given to the Wesleyan Methodist Missionary Society was given by way of charge thereon, which having failed, there was an absolute trust in favour of *S. C.* The 25th section of the 7 Will. 4, and 1 Vic. c. 26, is to be construed upon the principle of assimilating a residuary devise of real estate with a similar bequest of personalty, and therefore a devise which was, by construction, residuary, was held to pass lands which had been included in a devise, void, as being contrary to law. *Carter v. Haswell*, 29 Law Tim. Rep. 398.

DEVISE.—Construction.—Gift in trust for a mar-

ried woman — "Unmarried" in what sense used.—

The following case is one upon the construction to be put on the word "unmarried" in wills and settlements containing gifts in default of appointment by females. A testator bequeathed the residue of his moneys to trustees, in trust as to one-fourth for such person as his daughter *A. C.*, notwithstanding coverture, should by deed or will appoint, and in default in trust to pay the interest, &c., to *A. C.* for her separate use for life, and after her decease, in trust for such person, &c., as at the time of her decease would have been entitled thereto as her next of kin, in case she had died possessed or entitled to the same intestate and unmarried. *A. C.* was married at the date of the will. She died on the 26th Nov. 1852, leaving her husband and three children her surviving. No appointment of the fund was ever made in pursuance of the power. The husband and the brothers and sisters of *A. C.* claimed the fund, and thereupon the trustees paid the fund into court. On petition, the court held that the word "unmarried" was used by the testator only to exclude the husband from taking any benefit under the will, and that the children of *A. C.* were absolutely entitled. *Re Gratton's Trusts*, 29 Law Tim. Rep. 399.

DISSENTERS' BURIAL GROUNDS. — Defacing graves—Preventing future burials—Injunction.

—In the following case an injunction had been granted to restrain the defendants, Benjamin Laimbeer, William Hone, and Samuel Dunn, their agents, &c., from destroying or intermeddling with the respective family graves or vaults of the plaintiffs, Richard Moreland, John Curtis, Henry Hanks, Thomas Broadwood, and John Thomas Neate, situate in the burial-ground attached to the chapel in Tottenham-court-road, and from removing or defacing the tombstones, or obliterating the inscriptions thereon (*Moreland v. Richardson*, 22 Beav. 596; *S. C.* 25 Law Journ. Rep. Ch. 883). The court, however, refused to extend the injunction to the burial-ground generally, or to the family graves or vaults of other purchasers not parties, but who might, as prayed by the bill, come in and contribute to the suit. The result was, that on the night following this decision, at eleven o'clock, the defendants took thirty men and levelled the whole of the ground, leaving only the tombstones of the plaintiffs, which were protected by the injunction. On the day after, the Board of Health interfered: see 11 & 12 Vic. c. 63 (Board of Health Act), 18 & 19 Vic. c. 120 (Metropolis Local Management Act). Subsequently, on the hearing of the cause, the Master of the Rolls held, that where land has been set apart as a burial-ground, in which burial places have been purchased in perpetuity, the Court of Chancery will restrain

the holders of the legal estate, though claiming as mortgagees, from destroying or defacing such graves, or doing any act which may prevent future interments. *Moreland v. Richardson*, 26 Law Journ. Ch. 690.

DOWER.—*Construction of Dower Act—Execution of deed by husband.*—By the 3 & 4 Will. 4, c. 105, s. 3, it is enacted, that a widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land. In the following case, the question was raised whether a declaration in a conveyance not executed by the purchaser would bar his widow of her dower in the lands conveyed. Freehold lands were conveyed to T., and there was a declaration in the conveyance by him that no widow of his should be dowable out of the hereditaments thereby assured. T. died without having executed the conveyance, which was, however, executed by the vendor. Upon objection taken on behalf of a proposed purchaser of the land that the widow was dowable in consequence of the non-execution of the deed by T., the objection was disallowed: Held, also, that the word "dowable" was the same as "entitled to dower." *Fairley v. Tuck*, 6 Week. Rep. 9.

ELECTION [vol. 2, pp. 27, 195, 200].—*Heir-at-law of heritable bond in Scotland taking an interest under an English will put to his election.*—In order to put an heir-at-law to his election, the intention of the testator to dispose of property which he could not pass by his will must appear by demonstration plain or necessary implication. Where there are sufficient data before the court to satisfy itself that it is for the benefit of the infant to take under the will, it will not refer the matter to chambers to make inquiries. *Lamb v. Lamb*, 29 Law Tim. Rep. 372.

HUSBAND AND WIFE.—*Settlement—Separate estate—Marital rights—Subsequent property—Mistake.*—A husband and wife, under an erroneous idea that they were performing a covenant to settle the after-acquired property of the wife, directed a sum of money, to which she had become entitled, to be paid to the trustees of their marriage settlement, upon the trusts thereof. They executed a release, which recited these facts—After the decease of the husband, and the subsequent marriage of the wife: Held, that the money was appropriated to the trusts of the settlement; that the direction to pay to the trustees was, in effect, a declaration of trust; and that the transaction must be supported against the second husband, who claimed the money by virtue of his marital right. The income of property settled to the separate use of a married woman, if it accrues during her widowhood, loses the protection of the

settlement if it is invested for her benefit by a party who was not a trustee of her settlement, and upon her second marriage it will pass to her husband, though the principal from which it was derived remains subject to the original settlement. *Spicer v. Dawson*, 26 Law Journ. Ch. 704.

LEGACY.—*Condition precedent—Returning to England—Ineffectual attempt.*—A testator by his will had given to his son James a legacy of £2,000. By a codicil to the will, after noticing this bequest, and stating that his son had, since the making of his will, gone to Australia, proceeded to revoke that gift, and bequeathed to him, in lieu of the legacy of £2,000, £600 only; "but if he return to England before my wife's decease, I give him the further sum of £400." The widow died in 1856. In August, 1853, the son had taken his passage on board ship to return to England, but was never more heard of: Held, that the son's return to England was a condition precedent, and must have taken place before his right to the £400 accrued: Held, also, that the attempt to return was not a fulfilment of the condition. *Priestly v. Holgate*, 30 Law Tim. Rep. 30.

LEGACY.—*Satisfaction of a debt—Codicil—Direction for payment of debts and legacies.*—There is no case in which a direction to pay debts has of itself been held to afford sufficient presumption of an intention that a legacy to a creditor should not be in satisfaction of the debt due by the testator. Such a direction is an ingredient to be considered in coming to a determination, but it is nothing more; and so Knight Bruce, L. J., when Vice-Chancellor, seems to have felt in the case of *Rowe v. Rowe* (2 De G. and Sm. 294), where he laid hold of that circumstance, but coupled with another, to take the case out of the general rule. That other circumstance was, that the debts from the testator to the legatee in that case (a married woman) was money which belonged to her for her separate use, and he followed *Bartlett v. Gillard* (3 Rus. 149), without approving or disapproving of it. In the following case, before V. C. Wood, it appeared that a testator was indebted to his daughter, E. E., in a sum of £25, the balance of a larger sum, and by his will he directed his debts, and the legacies "thereinbefore mentioned," to be paid. By a codicil to his will he bequeathed her a legacy of £100. Between the date of the will and the codicil the daughter married: Held, that the direction in the will did not extend to the legacy given by the codicil, and that the legacy was a satisfaction of the debt: Held, also, that such a direction did not of itself afford sufficient presumption of an intention that a legacy to a creditor should not be in satisfaction of a debt due by the testator. *Edmunds v. Low*, 30 Law Tim. Rep. 31.

LEGACY.—"Money"—"Interest money"—*Intestacy as to other personalty.*—It is a rule that, in the absence of anything to give a different interpretation to the word "money," all that can pass under that term is money, and nothing else; and that, if there can be nothing found in the will to lead to the conclusion that the testator meant to include his general residuary property, it must be held that nothing passed but the cash. In the case of *Ommanney v. Butcher* (1 Turn. and R. 260), there was a gift of "all the rest of my money," with a direction to pay debts and funeral expenses. There it was held to be a residuary gift, because the testator was supposed to have included all the property which was liable to be applied to the payment of debts. In the following case it was held on a somewhat similar will, that there was nothing to lead to an inference that the testator meant to include his general property. It appeared that the testator, after directing payment of debts, &c., gave to his wife for life the interest of all sums of money he might die possessed of; after her decease, he gave all such "interest money" to his daughter for life, and after her decease he gave the principal and interest to be divided between his daughter's children. The testator, at his death, was possessed of £455 cash, besides furniture, farming-stock, and a farm at a yearly tenancy: Held, that there was a specific bequest of the money only, and an intestacy as to the rest of his property; and that the debts, &c., must be paid out of his general estate. *Larner v. Larner*, 26 Law Journ. Ch. 668.

LEGACY.—*Not cut down by power of disposition—Tenant for life.*—Where in a will there is an absolute gift with a particular power of disposition, a question may arise whether the absolute gift was not cut down in consequence of the power being confined to a specified mode of disposition; but where the power is absolute, it is certainly otherwise, being governed by *Re Yalden* (1 De Gex M. and G. 53), in which there was an absolute gift, with a power to dispose of the property by will or otherwise. Accordingly in the following case, *Wood, V. C.*, held that an absolute gift of a legacy is not cut down to a life interest by the addition of a general power of disposition at the death of the legatee. *Quære*, if the power had been limited. *Re Mortlock's Will*, 26 Law Journ. Ch. 671.

MINES.—*Minerals—Injunction—Damage to mansion-house—Construction of demise to work mines.*—The general principles which regulate the rights of working minerals, as between the owners of the minerals and the owners of the surface, are just the same whether the minerals have been granted in fee or for term of years only. In the well-known case of *Harris v. Ryding* (5 Meea. and W. 60), there

was an express plea by the owners of the minerals that they were working the mines according to the terms of their conveyance; and a demurrer was filed to that plea. The court, upon the argument of the demurrer, held that there was a common law right or rather inference that when an owner of lands, with houses and buildings on the surface, and minerals underneath, conveys the minerals to another, but retains the houses and buildings in his own hands, he is to be held, *prima facie*—of course, any express declaration in the deed may control such an inference—to have granted the minerals consistently with the rights and ownership of the property which he retains to himself. Thus, if A. grants to B. the lower story of a house, reserving to himself the upper story, A. will be held to have reserved to himself also the right of having the lower story upheld and maintained, so as to support the upper. Therefore, where the owner of houses and buildings, and also of mines, makes a demise of the mines, he is not to be taken except by express direct words, or by a direct implication equivalent to express words, to give license to the lessee of the mines to bring down the house, if that should be the consequence of working the minerals in a regular manner. These observations will explain the following decision:—A mortgagor and his mortgagee demised certain lands, containing 514 acres, for the purpose of being worked as coal mines, and for other minerals, with the usual powers of entry, to dig, &c., and make sale of the produce, except in or upon the demesne lands, about four acres (coloured red in the plan attached to the demise), on which a capital mansion-house had been erected, with the usual appurtenances: Held, that this was a demise of the mines under the whole acreage, but with a restricted right of enjoyment in the lessees; so that the lessees could not demise that part coloured red to any other person, and that they had no power to work the mines under the part coloured red. The lessees having commenced to work under the other part of the land, and also in a trifling degree under that coloured red, whereby the mansion-house, &c., was endangered, and some partial damage had, in fact, accrued: Held, that the lessor was entitled to an inquiry whether any portion of the land, other than that coloured red, was required for supporting the mansion-house, &c., with a view to restrain the lessees from working any portion so found to be necessary. *Dugdale v. Robertson*, 30 Law Tim. Rep. 52.

PUBLIC COMPANY.—*Winding-up Acts—Act of 1848, s. 99, and Act of 1849, s. 17—Leave to move to have a name struck off from the list of contributories.*—By the 99th sec. of the Winding-up Act, 1848, a person whose name is inserted upon the list of con-

tributories may apply to the court to have his name removed from such list. By sec. 17 of the Winding-up Act, 1849, such person may apply to the master to review his decision, but it appears from the following decision that he is not bound to pursue this course:—A joint-stock company was provisionally registered in October, 1846. In November, 1846, B. applied by letter for 100 shares. He received a letter in reply, stating that seventy shares had been allotted to him, and a deposit of 1s. a share was paid by B., or on his behalf, on the 8th December, 1846. On the 26th February, 1847, the company was completely registered. The deed of settlement, dated 17th February, 1843, was never executed by B., but his name appeared in one of the schedules as the holder of shares, the deposit on which was stated to be part paid. On the 1st February, 1847, a call of 10s. a share was made by the directors, made payable on the 22nd February following. A payment of £3 10s. on account of this call appeared in the books of the company, to the credit of B., but he denied having paid anything on account of this or any subsequent call. A winding-up order having been afterwards obtained, B. was, after some discussion, placed by the master on the list of contributories, and paid £150 in respect of calls, to the official manager. B. moved under the 99th section of the Winding-up Act of 1848, to be at liberty to serve a notice of motion for the removal of his name from the list, and for repayment by the official manager of the £150. It was objected that the application was unnecessary, owing to the provisions of the 17th section of the Act of 1849, which gives the master power to review his own decisions. But it was held, that notwithstanding the 17th section of the act of 1849, the 99th section of the Act of 1848 still remained in force, and that the present motion might be regularly made. The court refused to impose terms upon the appellant that he should undertake not to ask for the repayment of the £150, and that he should undertake to pay the costs of the present motion. *Re The Merionethshire Slate and Slate Slab Company, Exp. Day*, 30 Law Tim. Rep. 51.

RESTRAINT OF TRADE [vol. 8, pp. 268, 286]—*Injunction*—*Master and servant*—*Soliciting custom*.—An agreement by a servant not to carry on the same trade as that in which his employer is engaged for a limited time after he leaves his service, is founded on a sufficient consideration, viz. the wages during his service. A servant carrying out milk at weekly wages, with trade allowances, will be restrained from trading on his own account in contravention of an agreement signed by him not to carry on the same business, &c., within the same district, for two years after ceasing to be employed

or leaving the service of his master, his successors, or assigns. *Benwell v. Inns*, 26 Law Journ. Ch. 663.

SOLICITOR AND COUNSEL.—*Extent of authority*—*Compromise*.—In the following notorious case, the Master of the Rolls has decided that neither a solicitor nor a counsel retained to conduct a cause has any implied authority to compromise it. *Swinfen v. Swinfen*, 6 Week. Rep. 10; 3 Law Chron. pp. 158, 271.

TRUSTEES [*ante*, pp. 86, 118, 119].—*Trustee Relief Act* [*ante*, pp. 18, 14]—*Costs*.—The Trustee Act is obviously framed to enable trustees, with funds in their hands, to relieve themselves from any responsibility which might arise or be incurred, and they are justified, except in very plain cases, in the payment of a fund into court. On the other hand trustees are not so justified where they do not act *bonâ fide*, but from capricious or worse motives, and from a desire to vex, annoy, oppress, or injure the parties with whom they are dealing. The case of *Woodburn's Trust* (*ante*, p. 86) is the leading case in this sense, that it established the jurisdiction which the court had, to make trustees pay costs; and the Master of the Rolls proceeded on the ground that a trustee might, in the first instance, decline to run any risk, but that he was not entitled, after leading on the parties to incur expense in proving their title, suddenly to pay the money into court, where he evidently acted from caprice without any assignable reason. When the case came before the Lords Justices, they thought it a case of oppression. In the following case, it appeared that H., being entitled in remainder to £500 under a will, makes an assignment for the benefit of his creditors, and becomes insolvent. The legacy falls into possession, and H. sends a written notice to the surviving executor of the will not to pay it to any one but himself. A claim is also made by the trustees of the deed, and the executor pays the £500 into court under the Trustee Relief Act. Upon a petition for payment out of court, asking the costs against the executor: Held, that he was justified in paying the money into court, and must have his costs. *Re Headington*, 6 Week. Rep. 7.

WILL.—*Direction by widow for payment of debts of late husband*—*Composition*—*General release*—*Dilapidations*.—A mere direction in a will to pay debts will not necessarily include those which have been previously released by a formal deed. The rector of a parish died insolvent, leaving the rectory-house dilapidated. He was indebted to W., who, with other creditors, received a composition for their debts from the widow and administratrix of the deceased, and they executed a general release by signing their names against the amount stated in the

schedule. W. succeeded to the rectory, and he made a further claim of £200 against the estate of the insolvent for dilapidations. The insolvent's widow afterwards, by her will, charged her real and personal estate with the payment of her husband's debts. In a suit for the administration of her estate: Held, that the release discharged all the claims of W. against the estate of the insolvent, and that the claim for dilapidations was not payable under the will of the testatrix. *Bissett v. Burgess*, 26 Law Journ. Ch. 697.

EQUITY PRACTICE.

ADMINISTRATION.—*Order for an account of liabilities*—*Motion*—18 & 14 Vic. c. 35 [see *ante*, p. 13].—Where an order for an account of debts and liabilities is necessary under Sir George Turner's Act, 13 & 14 Vic. c. 36, s. 19 (*ante*, p. 13), such order may be mentioned to the court; and, *semble*, it should be by motion, not by petition. *Re Brown*, 6 Week. Rep. 5.

COPYHOLD COMMISSIONERS.—*Costs of appearance on petitions where no opposition* [*ante*, p. 48].—Formerly it was the practice to give every person served with a petition the costs of his appearance, although such appearance is unnecessary; but this, it seems from the following decision, is confined to petitions in a cause (see *Day v. Croft*, 19 Beav. 518). Where copyhold lands had been enfranchised under the Copyhold Act, 1852, and the money had, under the provisions of the act, been paid into the bank to an account, "Exp. The Copyhold Commissioners:" Held, that the commissioners are entitled to the costs of appearance on the petition of the lord to have the money invested, although no opposition was offered, or objection made, to the prayer of the petition. *Ex parte Queen's College, Cambridge*, 6 Week. Rep. 9.

LEASES AND SALES OF SETTLED ESTATES ACT [*ante*, pp. 12, 48].—*Married woman abroad—Commission.*—The 38th section of 19 & 20 Vic. c. 120 (vol. 3, pp. 105—111), does not authorise a commission to examine a married woman abroad. The solicitor appointed by the court must be in actual practice, and not the solicitor of the husband. *Re Noyes*, 6 Week. Rep. 7.

PRODUCTION OF DOCUMENTS [*ante*, pp. 47, 48; vol. 3, pp. 35, 127, 375, 398].—*Privileged communications* [vol. 3, p. 297].—*Agent for getting up evidence.*—In *Curling v. Perring* (2 Myl. and K. 380), the Master of the Rolls decided that a correspondence having taken place between the defendant's solicitor, and a person not a party to the suit, after the dispute which was the subject of the litigation had arisen, the plaintiff was not entitled to the inspection of it; and that, if the right of inspec-

tion were allowed in such a case, it would be impossible for a defendant to write a letter for the purpose of obtaining information on the subject of the suit without the liability of having the means of his defence disclosed to the opposite party. The case of *Steele v. Stewart* (1 Phil. 471), went, perhaps, a step further. The communications there were made between the person sent out to collect evidence, and were partly with the defendant and partly with his solicitors; and Lord Cottenham held that he must be taken to be the agent of the solicitor. In the following case, it appeared that the defendants in a suit, by the advice of their solicitor, sent an agent abroad for the purpose of collecting and getting up the evidence in support of their case; and it was held, that the reports and letters transmitted by the agent to his principals, relating to such evidence, were privileged. *Lafone v. Falkland Islands Co.*, 6 Week. Rep. 4.

TRANSFER OF FUND.—*Order for transfer of fund on motion.*—Where the title to a fund carried over to a legacy account is clear, the court will, on motion, order a transfer of such fund. *Linford v. Cooke*, 6 Week. Rep. 5.

COMMON LAW.

ACTION.—*When maintainable—Statutory obligation—Remedy, whether exclusive or cumulative—Summary process*—18 & 19 Vic. c. 120, ss. 105 and 225.—The following illustrates the rule stated in the First Book, p. 22, as to no action being maintainable where a penalty is imposed by statute recoverable before justices. Where an act of Parliament creates a pecuniary obligation, and gives a remedy by a particular mode of proceeding, a question arises on the particular terms in which it is given—viz., whether it is exclusive or cumulative. The 225th section of the Metropolis Local Management Act provides that where the amount of any costs or expenses is by that act directed to be ascertained or recovered in a summary manner, or the amount of any damages, costs, or expenses is directed to be paid, and the method of ascertaining the amount or enforcing payment is not provided for, such amount shall in case of dispute be ascertained and determined by, and shall be recovered before, two justices. The 105th section provides for paving new streets, and that the owners of the houses forming the street shall on demand pay to the vestry the amount of the estimated expenses, to be determined by the surveyor for the time being, and the actual expenses, in case they exceed the estimate. The 217th section makes the occupier liable in the first instance, giving him a power to deduct the amount so paid from his rent: Held, on demurrer, that the remedy given by the statute is exclusive, and therefore that

no action lies at the suit of the vestry against an owner for the amount of such expenses. *The Vestry of St. Pancras v. Batterbury*, 26 Law Journ. C. P. 243.

ARREST.—*Malicious—Action.*—In an action for a malicious arrest, such arrest being for a larger amount than was due upon a judgment, the plaintiff must show special damage. Thus in the case of *Churchill v. Siggers* (3 Ell. and Bl. 929), the Court of Queen's Bench, in an elaborate judgment, held an action to be maintainable for a malicious arrest without reasonable or probable cause, for more than remained due upon the judgment, special damage being shown to have been sustained by the plaintiff in consequence of such arrest. In the following case, the declaration stated that the defendant recovered judgment against the now plaintiff for £265 9s. 6d., and afterwards obtained from certain debtors of the plaintiff, as garnishees of a certain debt then owing to the plaintiff, the sum of £20 18s. 11d. in payment and satisfaction of so much of the said £265 9s. 6d., and that the defendant afterwards maliciously sued out a *ca. sa.* for the whole amount, and indorsed the writ with directions to the sheriff to levy the whole amount, and delivered the said writ to the sheriff, who afterwards arrested and imprisoned the plaintiff under the said writ to satisfy the defendant the whole of the said sum of £265 9s. 6d.; and that the plaintiff, by reason of the premises, was necessarily put to and incurred divers costs and expenses in and about his maintenance during the said detention, and in and about obtaining his discharge. Upon demurrer, it was held, in accordance with *Churchill v. Siggers* (3 Ell. and Bl. 929), that such action is maintainable if special damage be shown, and that special damage was sufficiently alleged in the declaration. *Jennings v. Florence*, 30 Law Tim. Rep. 54.

CORPORATION.—*Simple contract by corporation—Adoption—Pleading.*—The following decision of the Court of Queen's Bench in Ireland supports what is stated in the "First Book, p. 96, as to a corporation being liable on a simple contract. The Chief Justice, speaking of the plea of want of seal, said he should like to know whether that defence had ever been extended to the case of goods sold and delivered: adding that he knew of no such case. He, however, admitted that when parties rest on the contract alone, there may be a question whether a corporation can be bound by a contract not under seal; but (he said) even that question had been now settled, and that on no novel principle—namely, that a company incorporated for the purpose of a particular trade is entitled, as a matter of convenience, to make contracts not under seal respecting the subject-matter of that trade; this is clear on the

cases of *Henderson v. Australian Steam Packet Co.* (5 Ell. and Bl. 409), and *Renter v. Electric Telegraph Company* (6 Id. 341); but no reference was made to the dissenting opinion of Lord Wensleydale, *ante*, p. 151. It appeared in the following case that the promoters of the Beet Sugar Company having entered into a simple contract for the supply of goods to be used for the purposes of the company, and the goods having been supplied after incorporation; in an action against the corporation: Held, first, that the defendants might be liable on the simple contract, and (dissentiente Crampton, J.) that there was evidence to go to the jury of adoption of the contract after the incorporation of the company; and, secondly, that the corporation having, as such, pleaded a conditional contract, of which they alleged a breach, they thereby admitted on record a contract under seal (per Lefroy, C. J.). *M'Andrew v. The Irish Beet Sugar Company*, 30 Law Tim. Rep. 55.

DISTRESS.—*Landlord and tenant* [ante, pp. 50, 91].—*Impounding—Tender of rent*—11 Geo. 2, c. 19.—By the 11 Geo. 2, c. 19, a distress taken for rent may be impounded on the premises. A tender of rent after the distress is impounded is too late. Where a landlord sends in a person to distrain for rent upon the tenant's premises, but none of the goods are removed, and by the tenant's request nothing is done but an inventory taken and a man left in possession: Held, that this is an impounding under 11 Geo. 2, c. 19, and that the landlord was not bound afterwards to accept a tender of rent. *Tennant v. Field*, 6 Week. Rep. 11.

INTEREST.—*Not after judgment—Action for interest agreed to be paid upon a bill, if such bill were not paid at maturity, after judgment recovered in an action upon the bill itself for the amount of bill and costs.*—When judgment is recovered on a contract or bill of exchange, the claim for interest in respect thereof is passed into *res judicata*, and therefore ceases, though it may be payable in respect of the judgment under the statute giving interest on judgments recovered. In the following case, it appeared that the defendant, jointly with another person, undertook, if a bill of exchange drawn by the defendant in favour of the plaintiff were not wholly paid at maturity, to pay as interest thereon £20 for each month during which the bill should remain unpaid after maturity. The bill was not paid at maturity, and the plaintiff paid the defendant for the amount of the bill, and the interest £20 per month, as appeared by his particulars of demand specially indorsed. He declared upon the bill only, and recovered judgment by default for the amount of the bill. He afterwards brought an action for the interest as per agreement: Held, that he could not recover for interest subsequent to the judgment, the

claim being then *res judicata*, but that he was entitled to interest prior to the judgment, as he could not have recovered it in the first action, there being no count upon the agreement, or for interest. *Florence v. Jennings*, 30 Law Tim. Rep. 53.

LIFE INSURANCE [*ante*, p. 51].—*Action against company by assured—Transference of funds—Ceasing to carry on business.*—The plaintiff effected a policy of insurance in the company of the defendants by the terms of which the funds of the company were, according to their deed of settlement, to be subject to pay, &c.; and no shareholder was to be individually or personally liable beyond the amount unpaid of his shares. The defendants transferred their funds to another company, and ceased to carry on business. The plaintiff, before the happening of the contingency, on the happening of which the sum insured would become payable, sued the defendants for transferring their funds, and ceasing to carry on business: Held, that the action would not lie. *King v. The Accumulative Life Fund and General Assurance Company*, 6 Week. Rep. 12.

MALICIOUS PROCEEDINGS AT LAW.—*Insolvent—Maliciously procuring order of imprisonment—Statute of Limitations* [*ante*, pp. 53, 54].—Action for maliciously procuring evidence against the plaintiff whereby he was imprisoned for sixteen months by order of commissioner of Insolvent Court: Held, that such order is the act of the court, and, therefore, the plaintiff cannot maintain his action six years after the date of such order for imprisonment. *Violet v. Simpson*, 6 Week. Rep. 12.

NEGLIGENCE.—*Public Health Act—Negligence of contractor* [First Book, 105].—*Liability.*—In the cases of injuries from negligence, the principle *respondet oster*, whilst it makes the superior liable, does not relieve the inferior from liability, where through his negligence loss has been sustained. In cases of public acts, parties acting under them are exempted from liability in many cases in which otherwise they would be liable. Sec. 140 of the Public Health Act, 1848, enacts, that no matter, &c., done by any officer or person acting under the direction of the local board, shall, if the matter, &c., were done *bonâ fide* for the purpose of executing the act, subject him personally to any action, liability, &c., whatsoever. Under this provision, if there is no negligence, a party doing an act in obedience to the board of health is not liable—in that case he is very properly absolved, and the superior alone is liable; but if he is guilty of negligence in doing the act, and damage ensues, he is personally liable. A contractor employed by a local board to execute a work on a highway is not relieved by s. 140 of the Public Health Act, 1848, from liability for negligence in the execution of the work, whereby a

third party suffers damage. *Arthy v. Coleman*, 6 Week. Rep. 34.

PATENT [vol. 2, p. 231; vol. 3, p. 396; vol. 1, p. 369].—*Want of novelty—Identity of mode of application.*—A patent was taken out in 1853 for improvements in finishing cotton and linen yarns. In 1856, another patent was taken out by the owners of the former patent for improvements in finishing yarns of wool or hair: Held, that the patent of 1856 was bad, the machinery and mode of application to the new material being the same as in the patent of 1853, and therefore, the only difference being in the application of the same invention to another material, there was no novelty. *Brooke v. Aston*, 30 Law Tim. Rep. 131; 6 Week. Rep. 42.

PATENT [vol. 3, pp. 159, 183].—*Infringement of patent—Title of assignee—Registration—Pleading—Notice of objection.*—The provisions contained in the 5 & 6 Will. 4, c. 83, and the 15 & 16 Vic. c. 83 (see 1 Law Chron. 275), as to notice of objections in actions for infringement of a patent, are confined to objections affecting the validity of the letters patent, and the defendant may object to the validity of an assignment of the patent though no notice of such objection has been given. To a declaration for the infringement of a patent, which alleged that by indenture the letters patent "were duly assigned to the plaintiff," the defendant pleaded that the letters patent were not assigned as alleged: Held, that the plaintiff's title under the assignment was put in issue, and the assignment not being registered in pursuance of the 15 & 16 Vic. c. 83, s. 35, that the verdict was properly entered for the defendant upon the plea. *Chollet v. Hoffman* 26 Law Journ. Q. B. 249.

RAILWAY AND CANAL TRAFFIC ACT [vol. 3, pp. 130, 401].—17 & 18 Vic. c. 31—*Tolls.*—The court will, by injunction under 17 & 18 Vic. c. 31, enjoin a railway company to give the same advantage, as to the payment of tolls, to persons who do not, as to persons who do, send their goods to the railway through particular agents. *Bazendale v. The North Devon Railway Company*, 30 Law Tim. Rep. 134; 6 Week. Rep. 38.

SHIPPING.—*Merchant Shipping Act, 1854—6 Geo. 4, c. 125, s. 59—Compulsory pilotage within London district.*—The exemption of certain vessels from compulsory pilotage under 6 Geo. 4, c. 125, s. 59, is still in force under 17 & 18 Vic. c. 104, s. 353, although 6 Geo. 4, c. 125, is repealed by s. 17 & 18 Vic. c. 120; and such exemption is not repealed by 376 of the 17 & 18 Vic. c. 104, which, taken with s. 379, extends the exemptions expressly retained by s. 353 to certain other vessels. *Reg. v. Stanton*, 30 Law Tim. Rep. 118; 6 Week. Rep. 39.

STATUTE OF LIMITATION [vol. 3, pp. 80, 167, 217].—*Mercantile Law Amendment Act, 1856, s. 10—Immediate operation of—Disability of imprisonment* [vol. 3, pp. 89, 91].—*Right of prisoner to allowances under 53 Geo. 3, c. 113, lost by title to discharge under Insolvent Act.*—By sec. 10 of the 19 & 20 Vic. c. 97, it is enacted that "no person who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by the act 21 Jac. 1, c. 16, &c., shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed, &c., in the cases in which imprisonment is now a disability by reason of such person being imprisoned at the time of such cause of action or suit accrued." It has been decided by the Court of Queen's Bench that the above 10th section of the *Mercantile Law Amendment Act, 1856*, takes away the disability of imprisonment from persons who were imprisoned, and whose causes of action accrued, but who had not commenced their actions before the passing of the act. A prisoner for debt who is entitled to be discharged under the act for the Relief of Insolvent Debtors, is not entitled by remaining in prison to allowances under 53 Geo. 3, c. 113. *Comill v. Hudson*, 30 Law Tim. Rep. 130; 6 Week. Rep. 37.

TROVER.—*Evidence of conversion—Statement of defendant—Refusal to deliver up alleging the thing was burnt.*—In an action for the conversion of a bill accepted in blank, the evidence was that it had been given by the plaintiff to a brother of the acceptor, the defendant, to get a mistake in the defendant's signature rectified; and that the defendant, on being applied to for the document, had said, "I cannot give it up because it has been burnt." There was no other evidence that it had ever even come to his hands, but the defendant was not called at the trial: Held, that there was evidence from which the jury might infer that the defendant had destroyed the acceptance. *M'Kewan v. Cotching*, 6 Week. Rep. 16.

NOTICES OF NEW BOOKS.

SWABEY ON DIVORCES.

The Act to amend the Law relating to Divorce and Matrimonial Causes in England, with Notes on the Principles and Practice of the Ecclesiastical Courts in similar Cases, and the Changes introduced by the present Act. By M. C. MERTINS SWABEY, D.C.L. London: Shaw and Sons.

THE time is fast approaching for the new act relative to divorces to be put in operation. Already the judge of the new court has been nominated; and Mr. Justice Cresswell is known to be trying his

'prentice hand in matrimonial law, preparing for the heavy conflict, which is evidently about to be waged, so soon as the "Order in Council" appears. It will soon be seen whether our ancestors were really wiser than ourselves; whether their notion of the indissolubility of the marriage tie was better than our loosening process. They appear to have formed their notions of the marriage *status* much upon the principle which governed the doctrines relating to real property: as in the latter they could only allow a plenum in the shape of a feudatory for life at the least (scorning to notice the limited and uncertain interest of a termor, though extending to a thousand years), so in the former they would not admit of less interest than for life—in the language of old Britton, "*per demurrer ensemble come un chaire à tous leur vies sans espoir de departure.*" We demur, indeed, to this practice, and have, by a new Act, given both husband and wife "*espoir de departure*," though, perhaps, not quite *French*—leave, any more than Britton's language can be called modern *French*—though we may notice, *en passant*, that it is rather appropriate *French* for us, being such as Britons usually make use of at the present day, when they essay in Paris to pass themselves off as real natives. We have not yet, indeed, arrived to that point at which it would be lawful for a man and woman to contract matrimony for a certain number of years, but we have made the former enduring life interest defeasible on certain events—a sort of marriage *durante bene placito*, or more precisely, but not unfortunately much opposed, *durante castitate*. There is little doubt that the new court will commence with a good crop of cases, for we understand the act is very acceptable to many married couples, and there has not been a statute which has had so great a sale since the Abolition of Arrest Act, of which many thousand copies were sold to persons who were under the pleasant impression that there was no longer any need to pay their debts.

There can be little doubt that the act will afford additional employment to the profession, and in that light it is one of considerable interest. At the same time, the novelty of the practice will make great demands on the practitioner, and cause him to seek a guide through the labyrinthine clauses of the act, particularly as the matter smacks of mystery, by having been the peculiar province of proctors and civilians; and if the latter possessed much civility, it is generally believed they kept it to themselves, and certainly it never extended its influence to the proctors. The profession will, therefore, be glad to have a work from one who is able from former labours to guide them safely, so far as the old may serve as a precedent for the new practice. We have not space to speak more fully of Dr.

Swabey's work, but we may say that it appears to us to be very well executed, and to furnish just such information as practitioners are likely to require. He has furnished a very useful introduction, giving an account of the divorce law in England, and of the marriage contract both here and abroad. Then comes the statute itself, accompanied by notes, and some of them of great length: indeed, in two or three instances, of too great length to be agreeable, and which would have been better placed by way of appendix at the end of the work. Afterwards, we have an appendix of forms, which will be useful to counsel if not to solicitors; and the whole is wound up by a very ample index. Want of space forbids extracts in this number, but we hope in our next to supply the deficiency, as it is a work which furnishes very much extractable matter, and such as is likely to be generally serviceable.

MOOT POINTS.

No. 18.—*Surgeon's Apprentice.*

Will you permit me, as a subscriber to your journal, to solicit through its medium the opinion of your correspondents on the following point:—

A., a minor, was apprenticed for five years to a surgeon in the country. After serving for two and a-half years with his master, he went up to London, in accordance with a proviso in his indentures to spend the remainder of his apprenticeship in "walking the hospitals." He, with the consent and in the presence of his father, agreed verbally with B., a London surgeon, to assist him in his profession during the two and a-half years he proposed remaining in London, in consideration of his (B.) providing him (A.) with board and lodging during that period. After remaining with B. about a year, circumstances arose which rendered A. desirous of determining his engagement with B., who, on being applied to for that purpose, refused his assent, and, moreover, threatened that if A. refused to fulfil his engagement, he would have him arrested and take proceedings against him. The matter was, however, ultimately arranged amicably.

Under these circumstances, what would have been the respective powers and liabilities of A. and B.?

I apprehend B. would have had no remedy or right of action against A., since it appears to me that the agreement was void *ab initio*, being merely verbal, and therefore not in accordance with the 4th section of the Statute of Frauds, which provides that no action shall be brought on any agreement that is not to be performed within one year from the making thereof, unless such agreement or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or by his lawful agent.

CIVILIS.

No. 19.—*Articled Clerks.*

I shall be much obliged if some of your numerous correspondents will favour me with the following information (*viz.*): 1. Whether it is the duty of an articled clerk (when the usual clauses are in the articles) to copy abstracts, wills, &c., and engross? 2. What it is customary for an articled clerk to do when in the office? 3. Can an articled clerk compel his master to let him serve his last year with agents in London (where there is no mention made in the articles concerning it), and if so, by what means?

AN ARTICLED CLERK.

No. 20.—*Board of Health—Costs of Legal Proceedings.*

Are the expenses incurred by a Local Board of Health in depending or instituting proceedings to maintain a public right of way payable out of the general district rate? or how otherwise?

It should be borne in mind that the local board are appointed surveyors of the highways under the 71st section of the Health of Towns Act.

ALIQUIS.

No. 21.—*Specific Performance with Compensation.*

By a written unqualified agreement, A. sells to B. for £400, a house and garden containing altogether about half an acre. On delivery of the abstract, it appears all mines, minerals, and quarries had been reserved by C. (a former vendor), with the usual powers of entry and working by C., his heirs and assigns, his and the agents, workmen and servants and with liberty to make roads, trenches &c., and to erect engines and works in, on, or under any part of the said hereditaments, to promote any other works of said C., &c., in the neighbourhood paying a compensation at the rate of £4 per acre annually for any damage to the surface during the existence of such damage only. Can B. insist on a specific performance of the contract with a compensation for the undisclosed incumbrance, or must he altogether accept or reject the contract?

S. H. P.

No. 22.—*Devise—Lapse—Jointure.*

A., by his will, gives an estate to B. in trust for E., F., and G., in such parts, &c., as B. shall appoint, and in default of appointment to the said E., F., and G. as tenants in common in fee. F. dies in testator's lifetime. Will one-third of the property fall into the testator's residuary bequest? Will a power to raise portions displace a jointure previously appointed?

H. W.

No. 23.—*Deposit of goods as collateral security.*

Does a person lending money upon a promissory note, and receiving as collateral security a deposit of plate or goods, render himself liable to the pawn-broking Acts? An answer will oblige,

J. (Liverpool).

COURSES OF LAW STUDIES.

(Continued from p. 190).

Guardianship.—There is distressing confusion in Blackstone's explanation of the different kinds of guardianship (1 Bl. Com. 461), and which seems to arise from not distinguishing, with sufficient accuracy, between guardianship by *nature*—which is confined, by the common law, to the heir apparent alone, and continues till he attains the age of twenty-one—and guardianship by *nurture*, which is of all the children equally, and ceases at fourteen, in the case both of males and females (Co. Litt. 84. a. b. and see note 66). He designates the father, and, in some cases, the mother, as the guardians by nature, which is, implicitly, to exclude the other ancestors; whereas, in point of fact, the law makes no such exclusion (see 3 Co. 88 b.). Neither, again, is this at all explained by the sentence which follows; "for if an estate be left to an infant," &c. On the contrary, the guardianship by *nature*, being restricted by the common law to the heir apparent alone, and not extending to the other children, the receiving the profits of the estates of the children in general, is, consequently, no part of the office of the guardian by *nature*. Again, it is a very doubtful point with regard to daughters, whether the alleged guardianship is recognised (as Blackstone says) by the construction of the statute 4 & 5 Ph. and M. (this statute is repealed by 9 Geo. 4, c. 31); or whether, on the contrary, the latter is not merely a statutory guardianship, directed by the Legislature in conformity to the dictates of nature, and upon principles of general reasoning (see the note 66, to Co. Litt. 88 b.). And still more questionable is it, whether the ordinary may appoint, in default of the guardians by *nurture*; or whether, on the contrary, the appointment of the ecclesiastical court is not confined merely to guardians *ad litem* (see the note 70, to Co. Litt. 88 b. sect. 3).

Wrongful and innocent conveyances—Contingencies—Common law leases—Grant and livery—Fines and recovery.—It is usually understood, I believe, that of the four volumes which form the subject of our present consideration, the second (upon the rights of things) is that in which Blackstone principally excels; not only in the selection and arrangement of his materials, but also in the propriety and perspicuity of his manner of treating them. And yet, with respect to the doctrines which confessedly fall under this division of inquiry, how extremely difficult it is for the student to form to himself a clear and precise notion of those ordinary common-place distinctions between *droiturel* and *tortious* conveyances, between descendible freehold and fee-simple qualified, and between estates limited in contingency

by deed and by devise. How difficult is it, from what is said in explanation of the nature of our common-law leases, together with their several enlargements and restrictions, to collect even the primary distinctions between void and voidable, for years and for life, and between things in grant and in livery. The operation of a fine too, as it differs from that of a recovery (where the tenant in tail has the reversion in himself, and there are no intermediate remainders), is by no means distinctly elucidated; nor why a recovery cannot be had of an estate-tail with single voucher, but only with double voucher at least.

It is proposed to elucidate the above matters by examining them separately in some detail, which, with what has been before stated, will be useful, not only to the practitioner, but also to the student, as furnishing a *model* for the due investigation of other points of law.

OF THE DISTINCTION BETWEEN DROITUREL AND TORTIOUS CONVEYANCES.

Innocent and tortious conveyances.—*Droiturel*, otherwise called *innocent* conveyances are of the right only, and not of the possession, and are either primary or secondary. Of the first description are all original conveyances of things which lie only in grant, and not in livery, and of which no visible possession can be delivered, as advowsons, rents, commons, reversions, and other incorporeal hereditaments. Those of the second class are, where there is already such subsisting privity of estate between the parties, that any further delivery of possession would be vain and nugatory; as in the case of release, confirmation, and surrender. Conveyances which are thus made, can be evidently no other than *droiturel*—that is to say, they cannot enure to pass more than may be innocently or rightfully conveyed; for the transfer of a right becomes a mere nullity when exercised beyond the subsisting right to transfer; *nemo potest plus juris ad alium transferre quam ipse habet* (Co. Litt. 309 b.). On the other hand, all original or primary conveyances, wrongfully made of things in livery, as of lands or tenements (of which the corporal possession is made over by the act of livery of seisin without any reference to the right) were, prior to the 9 & 10 Vic. c. 106, said to be *tortious*. [But by sec. 4 of that statute feoffments made after the 1st October, 1845, have not now any *tortious* operation; fines and recoveries by which the effect of a *tortious* alienation was had, were abolished by the 3 & 4 Will. 4, c. 74.] Thus, if A. tenant in tail by a feoffment leased to C. for life, remainder to D. in fee, the discontinuance was in fee; for both estates were created by one and the same livery. But if A. having leased

to C. for his life, had *afterwards* granted the reversion to D. in fee, the discontinuance would have been then for life only, and not in fee; for the reversion lies in "grant," and not in "livery." And so it is and always was of a bargain and sale inrolled, a lease and release, a covenant to stand seised, and the like. They were and are all of them *droiturel* or innocent conveyances, because they operate upon the right only, and not by transmutation of the possession, and, consequently, could and can convey no more than may be rightfully and lawfully conveyed (See the note 231, Co. Litt. 271 b.). [It must be borne in mind that the *immediate* freehold of *corporeal* tenements and hereditaments now lies in *grant* as well as in *livery* (8 & 9 Vic. c. 106, s. 2), and that a discontinuance after the 31st December, 1833, does not defeat or toll any right of entry or action for the recovery of the land (3 & 4 Will. 4, c. 27, s. 39), so that now all conveyances may be considered as *innocent*; but the former distinction must be borne in mind as to old transactions.]

Feoffment and release by tenant in tail.—Again; if tenant in tail made a feoffment, it was a discontinuance, because the feoffee's estate was created by livery of seisin, and was of a greater quantity of estate than could be lawfully carved out of an estate-tail. But if the tenant in tail was disseised, and released in fee to the disseisor, albeit the fee was not his to release, yet it was no discontinuance; for there was no transmutation of the possession or freehold by the release, but only a transfer of the right (Co. Litt. 42 a. 252 a.).

Tenant in tail, mortgage.—Again, take the following case of a mortgage, which was not at all uncommon. A. tenant in tail, made a mortgage to D. by lease and release, and died; and afterwards B. the issue in tail, entered and suffered a recovery. In this case the recovery was good, notwithstanding the mortgage; because the conveyance by lease and release was *droiturel*, and consequently determined upon the death of the tenant in tail, and entry of the issue. But, if the mortgage had been by feoffment, it would have been otherwise, because the feoffment would have operated as a discontinuance, and the issue could not have made a tenant to the *præcipe* until he had first defeated that discontinuance, which he could not do by his entry, but only by his action. [By the 3 & 4 Will. 4, c. 74, if a tenant in tail of lands makes a disposition of them under that act (i. e., by an inrolled conveyance), by way of mortgage, or for any other limited purpose, such disposition to the extent of the estate thereby created, is an absolute bar to all persons as against whom such disposition is by the act authorised. Thus a mortgage in fee in the usual form will be an absolute bar; if *pur autre vie* or for a less estate, or a mere charge, it will be a bar *pro tanto* (Brow. 85)].

Powers, extinguishment by conveyance.—Upon the same principle, where there are powers relating to land, which have their operation under the statute of uses, or the statute of wills, the tenant by a tortious conveyance, might often have extinguished such of those powers as are said to be "in gross;" but if the conveyance is *droiturel*, they remain unaltered. As for example: "If tenant for life, with a power to jointure an after-taken wife, conveys a life-estate by bargain and sale, lease and release, or covenant to stand seised, this conveyance will not affect the power of making a jointure. If he even makes a conveyance in fee by any of these assurances, as it is not their operation to pass a greater estate than the grantor has a "right" to convey, the power in gross is not affected by it; but if he conveyed by fine, feoffment, or recovery, as these assurances not only passed the estate of the grantor, but conveyed a tortious fee, they necessarily disturbed the whole inheritance, and consequently divested the seisin, out of which the uses to be created by the power were to be fed; they, therefore, operated in extinction of the power (see note 298 Co. Litt. 342 b.; see *supra*).

Innocent conveyances preferred to tortious, even before the abolition of the latter.—It is to be further remarked, that the law even formerly intended every conveyance, wherever it could be so intended, to be *droiturel* rather than tortious (and now there can be no tortious conveyance). For example: suppose A. granted to B. in tail, keeping the reversion to himself. If, afterwards, B. re-infeoffed A. the law would have intended this to be only a surrender of B.'s particular estate, and on B.'s death the issue in tail might have entered. For, if A. had taken by feoffment, he would have tortiously defeated his own reversion, which would have been against the received maxim, "that a small estate by right, is to be preferred in law to a greater estate by wrong" (Co. Litt. 42 a. 252 a.). And so, again, if lands were given to A. for life, remainder to B. for life, remainder to C. in fee, and afterwards B. disseised A., he acquired by the disseisin a fee simple; for the law would not have allowed him to qualify his own wrong (see note (255) Co. Litt. 296 b.); but if, afterwards, A. died in the lifetime of B., his wrongful estate in fee was changed, by judgment of law, into the rightful estate for life, and consequently the old reversion was again vested in C. as before the disseisin. It may be added that the construction which is agreeable to law, is always to be preferred to that which is against the law. Thus, if tenant in tail leases to another *for life*, it shall be construed to be for his own life, for that stands with the law, and not for the life of the lessee, which it is beyond his power to grant; but otherwise it is, if the lessor

has fee simple. *Et sic de cæteris* (Co. Litt. 42 a b, Ibid. 183 a b).

OF THE DISTINCTION BETWEEN DESCENDIBLE FREEHOLD AND FEE SIMPLE QUALIFIED.

Fee simple qualified and descendible freeholds defined.

—A fee simple qualified is the same in quantity of estate as a fee simple absolute; it has, likewise, all the incidents to a fee simple absolute, as inheritance, dispunishment of waste, right of dower and curtesy, and so forth, being only less than a fee simple absolute in respect of its duration (Co. Litt. 18 a); but a descendible freehold is without any of those incidents; being in effect no more than an estate *pur autre vie*, to which the heir succeeds, not as heir at the common law, but as the person specially appointed in place of an occupant (Co. Litt. 41 b.; and see the note 241). The distinction between descendible freehold and fee simple qualified, has been probably admitted since Littleton wrote (see Litt. sec. 612, 650; Co. Litt. 331 a.; Ibid. 345 b.).

Grant by tenant in tail.—For example: "If tenant in tail do grant to another all the estate he hath in the tenements to him entailed, by deed of bargain and sale (which, being of the inheritance, is required to be inrolled by the statute 27 H. 8, c. 16), to have and to hold to the other, and to his heirs for ever;" it operates as a droiturel conveyance of his whole estate and interest (see note 231, Co. Litt. 271 b.); and, consequently, as the grantor had an estate of inheritance in fee tail, so the grantee takes an estate of inheritance, not indeed of fee tail, because of the want of the proper words of limitation, "to the heirs of the body of the grantee," neither was it formerly of fee simple absolute, because it must necessarily have determined upon the dying without issue of the tenant in tail [but under the effect of the 3 & 4 Will. 4, c. 74, it would operate as a disentailing assurance, and be a full bar, and pass a fee simple absolute], but, in all other respects, this determinable or qualified fee simple (as it formerly was) had the properties of a fee simple absolute; it went to the heir as an inheritance,—the widow should have been endowed, the husband should have been tenant by the curtesy, and the tenant in tail should not have had an action of waste because he had parted with the reversion (Co. Litt. 53 a, Ibid. 356 a.; and see note 286 Co. Litt. 331 a.). But, "if tenant in tail do grant to another all the estate he hath in the tenements to him entailed by deed of lease, to have and to hold to the other and to his heirs for ever;" this [if not inrolled] is no inheritance to the grantee, but a mere descendible freehold (Co. Litt. 333 a.). For the operation of the lease is only upon the freehold, leaving the fee or inheritance in the lessor and his heirs, of whom the lessee holds as of the

reversion. Suppose, then, the grantee enters under the lease, and afterwards dies during the life of the tenant in tail, it is not the inheritance that descends to the heir of the grantee, but the mere freehold which the grantee himself had, and to which his heir does not succeed by descent, at the common law, as in the former case, but by force of the special words of the original grant; and, consequently, in case of waste or forfeiture, the tenant in tail may have an action of waste, or may enter, &c., in right of the reversion. [We cannot find the reference; see Litt. s. 613, and the note to our edition.—EDS.]

Devise in tail of estate pur autre vie.—And so, again, if a person seized of an estate *pur autre vie*, devises it to one and the heirs of his body, this is no estate tail, for all estates tail must be of inheritance, be dispunishable of waste, have right of dower, and must also be within the statute *de donis* (Co. Litt. 224 a); but it is the limitation of a descendible freehold; and the words *heirs of the body* are no more than a description of the person who shall hold the same during the life of the *cestui que vie*, to prevent an occupant (Co. Litt. 388 a.).

Descendible freeholds devisable, assets for paying debts.—It is further to be observed, that descendible freeholds were not devisable under the [repealed] statute of wills (32 & 34 H. 8), but were made so long afterwards, by the [part repealed] stat. 29 Chas. 2, [and now by the 1 Vic. c. 26, s. 3, "whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament,"] which stat. of Chas. 2, also made them assets in the hands of executors and administrators for the payment of debts and legacies; for, by the common law, no executor could succeed to a freehold. And again, by [the part repealed] stat. 14 Geo. 2, c. 20, the surplus of such estates, after payment of debts, &c., is made distributable like a chattel interest. [By the 1 Vic. c. 26, s. 6, estates *pur autre vie* of a freehold nature, not devised, are chargeable in the hands of the heir, if coming to him by reason of special occupancy, as assets by descent; if no special occupant, they go to the executor or administrator, and are distributable as part of the deceased's personal estate]. But the above did not apply to the estate of the bargainee of tenant in tail, which was before devisable under the statute of wills. And as of a bargain and sale inrolled, so it was of a lease and release without any inrolment, because it operated as a feoffment at the common law (Co. Litt. 207, a, n. 3). That is to say, it conveyed the same quantity of estate, supposing

the releasor to have the inheritance, but in other respects the operation of a feoffment was very different; for, if tenant in tail made a feoffment, it was a discontinuance; but a bargain and sale under the statute, or a lease and release at common law, never could work a discontinuance, because they were and are but *droiturel* conveyances, operating upon the right only, and not upon the possession. [The reader will bear in mind that the 3 & 4 Will. 4, c. 74, makes a great difference between the effects of an inrolled and an uninrolled deed.]

OF THE DISTINCTION BETWEEN ESTATES LIMITED IN CONTINGENCY BY DEED, AND BY DEVISE.

Reverter, possibility of—Fee in abeyance—Contingent remainder formerly destroyed by merger.—In the case of a fee being limited in contingency "by deed," there remains no more in the grantor and his heirs than a mere possibility of reverter and no estate of reversion; for the whole estate passed out of the grantor at once, by the act of "livery" of "seisin," which alone gives effect to this species of conveyance. But the operation of a devise being no more than the declaration of the use to which the land shall be subject after the testator's death, he is therefore at liberty to dispose of as much or as little as he thinks fit, and whatever he does not dispose of, as it remains vested in himself during his life, so it descends to his heir after him (Co. Litt. 23 a). In the former case, if the inheritance is limited in contingency, the fee is, therefore, said to be in abeyance; that is to say, it is only in the remembrance, intendment, and consideration of law, *caput inter nubila condit* (but see Fearn's C. R. 526; 2 Black. C. 107, note by Chr.; Co. Litt. 342 b. n. 1 Noy's Max. 109, 371, Byth.); but, in the case of a devise, it descends to the heir-at-law, and remains vested in him, until the contingency happens. For example, if A. leases to C. for life, remainder to the right heirs of D., the inheritance is plainly neither granted to C. nor D., and it cannot vest in the heirs of D. till after D.'s death, *quia nemo est hæres viventis*; and, consequently, as A. cannot retain it against his own grant and livery, it remains in suspense, *in nubibus*, or in abeyance (Co. Litt. 342 b.). But, if A. devises (which is in the nature of a limitation of the use, as well as the other express modes pointed out by the statute of uses) to C. for life, remainder to the right heirs of D. and dies, the reversion in fee, during the suspense of the contingency, descends to the heir of the testator; for the law never supposes the fee to be in abeyance, unless where it is necessary to recur to that construction; and, in the present case, there is no such necessity; for this was no parting with the possession (as in the former instance) by *livery of seisin*, but a mere declaration

of the use; and the statute only executes the seisin in the same proportion in which the use was disposed of, and nothing more. Supposing then, the heir and the devisee for life to join in a common conveyance, in the lifetime of D., the two estates being thus united together in succession, the particular estate will merge in the reversion, and the contingent remainder [was formerly] defeated and destroyed for ever [but now, by the 8 & 9 Vic. c. 106, s. 8, a contingent remainder, existing after the 31st Dec., 1844, shall be, and, if created before the passing of that act, shall be deemed to have been capable of taking effect notwithstanding the determination by forfeiture, surrender, or *merger* of any preceding estate of freehold]. But [prior to the above act] the contingent remainder was not defeated in the former case, where the limitation was "by deed;" for the particular estate does not merge in the possibility of reverter, but only in the estate of reversion (see 2 Law Chron. 252—256.)

Particular estate and reversion by one deed—Merger.—It is, however, to be observed, that where the particular estate and the reversion come, by one conveyance, to the same person, there can be no merger of an intervening contingent remainder; because it would evidently contravene the intention of the grantor or deviser. But, otherwise it is, where the particular estate comes by one conveyance, and the reversion by another; for there the operation of law has to contend with no such repugnance (2 Chron. 252). Thus where an estate is left to B. for life, remainder to the unborn son of D. in tail, remainder to the right heirs of B., B. takes a fee executed, subject to the possibility of the contingent remainder vesting. But if B. suffered a recovery, before the event on which the contingency was limited had taken place, the junction of the particular estate and the reversion in a third person, being a merger, was [before the 7 & 8 Vic. c. 76, and 8 & 9 Vic. c. 106] an extinguishment of the contingent remainder for ever (see Fearn's Cont. Rem. p. 345 et seq.; Burt. Comp. pl. 759).

OF THE CONSTRUCTION OF COMMON LAW LEASES.

Leases, void and voidable—For years and life—Grant and livery.—The principal distinctions to be observed in the construction of leases which enure by the common law (and such indeed is the case with all leases which are not strictly pursuant to the statute), (stat. 32 H. 8. c. 28 [repealed, except as to ecclesiastical leases, see 2 Chron. 111]), are, first, between void and voidable; secondly, between leases for years and life; and, thirdly, between things in grant and things in livery.

Void and voidable leases.—Between "void and voidable." If tenant in tail makes a lease for forty

years, rendering rent, and dies, this is not void but voidable, and if the *issue accepts the rent it shall bind him*. Why? Because the issue takes the same estate out of which the lease was originally derived; for the tenant in tail, who made the lease, was intrusted with the *jus possessionis*, "the right of possession of the inheritance;" and, therefore, the estate of the lessor continuing, the derived part or portion of it which constitutes the lessee's estate, has also continuance until the issue avoids it. And, because it is a maxim of law, that he who may defeat an estate by his entry, may equally make it good by his *confirmation* (Noy's Max. 178, Byth.); the issue may, therefore, confirm this lease if he will, and, as he may make an express, so he may make an implied confirmation, as by accepting rent or the like (Noy's Max. 168; Harr. N. P. 981; Doe v. Jenkins, 5 Bing. 469). But otherwise it is with respect to the remainder-man and the reversioner; for these take several and distinct estates from that out of which the lease was originally derived, and, consequently, upon the determination of the estate tail, by the tenant in tail dying without issue, the unexpired lease for years becomes absolutely void, and not merely voidable. The determination of the greater is the determination of the less estate, which was but a minor part or portion of it. [As to leases by tenants in tail, see 19 & 20 Vic. c. 120, ss. 2, 32; 2 Law Chron. 105—112; First Book, pp. 124, 130; 3 & 4 Will. 4, c. 74, s. 41, which last statute should have been there referred to.]

Leases for years and for life.—Between leases "for years and for life." If tenant for life, as tenant in dower or by the curtesy, makes a lease for years, upon the death of the lessor this is absolutely void, and can neither be made good afterwards by confirmation or otherwise (Harr. N. P. 987, 988); for the freehold out of which it was derived is determined, and the determination of the greater is the determination of the less estate. But, if such tenants make leases for life or lives, it is otherwise. Why? Because, in that case, they create greater estates than can be derived out of what they themselves have, and, consequently, as those leases are derived, not out of the estate of the lessor alone, but out of the two estates of the lessor and the reversioner together, it follows, that the reversioner may either defeat them or not, upon the death of the lessor, as he thinks fit. [By the 19 & 20 Vic. c. 120, s. 32, tenants by the curtesy and in dower of unsettled estates may, without the aid of a court of equity, make leases, except of the principal mansion-house, &c., for twenty-one years, with proper clauses. 3 Law Chron. 110; First Book, 130.]

Grant and livery.—Between things "in grant," and things "in livery." If the bishop, with con-

fimation of dean and chapter, makes a lease which is not strictly pursuant to the statute, and therefore operates as a common law lease, of things in livery, whether for life or lives, or for years, this is not void but voidable; and if, afterwards, the successor accepts the rent, he makes it good and unavoidable. Why? Because the bishop, who made the lease, was intrusted with the *jus possessionis*, "the right of possession of the inheritance," and therefore the estate, out of which the lease was derived, has continuance still; and then, according to the legal maxim, "that he who may defeat by his entry, may equally make good by his confirmation," if the successor accepts the rent he necessarily confirms the lease; and, by so doing, he has also waived taking advantage of the statutes which were enacted for making void such leases, because those statutes were made wholly for the benefit of the successor, against the predecessor's acts, and not against the successor's own acts. And, possibly (says the law), the reserved rent may be more beneficial to the successor than the land itself. But, if a lease be made for life or lives, of things in grant, as of tithes, or other incorporeal hereditaments (Co. Litt. 44 b, n. 3), the lease is absolutely void upon the death of the lessor and not merely voidable; and this is the reason which is assigned for it,—viz., that there was anciently [until the 5 Geo. 3, c. 17, s. 3; Harr. N. P. 310] no remedy, at the common law, by which the rent, in such case, could be recovered by the successor, if afterwards denied: he could not distrain, for there was nothing of which a distress could be taken (Co. Litt. 47 b, n. 8); and an action of debt would not [prior to the 8 Anne, c. 19; Harr. N. P. 310] lie, because, the lease being for life or lives, no action of debt was maintainable till after the lives ended (2 Com. Dig. 639; 3 Id. 251; Co. Litt. 44 b, n. 3); and, therefore, since the acceptance of the rent at one day, would not, at the common law, have enabled him to sue for it if afterwards denied, it was held to be unreasonable that he should be bound by such acceptance; and herein consists the principal distinction between the common law, and the law as it stands at this day upon the statutes. [Voidable leases may be equally made good, whether by accepting rent, or by distraining for rent due at the death of the predecessor, or by bringing an action for waste against the lessee: see 1 W. Saund. 287 d, n.; Rosc. Ev. 446, 5th ed.; Arnaby v. Woodward, 6 B. and Cr. 519; Harr. N. P. 1051]. And as it is of the bishop, in such cases, so it is of the dean, the archdeacon, the prebendary, and the like; for these are all "seised" *jure ecclesie* (see Bacon's Abr. tit. "Leases").

RESULT OF MICHAELMAS TERM EXAMINATION.

It appears that the number of candidates actually examined (for some did not appear, and others withdrew without finishing their papers) was 109—out of these, 85 were passed; and *twenty-four* were postponed, i.e. rejected, because their answers were not deemed sufficient. This number is not so great in proportion as on some former occasions, but still it is very large, and offers no great encouragement to future candidates, who may think they will "take their chance" at a proximate examination. The truth is, that articled clerks do not look at the matter in that serious light in which it ought to be viewed: they begin their studies too late, and they even then fail to avail themselves of all the opportunities afforded them. To notice one point only, we may observe that many clerks do not even peruse our "*Keys to the Examinations*," though they were expressly written for their use, and nearly every question can be answered from them.

The following are the names of the candidates, (under the age of 26) at the last examination, whom the examiners considered deserving of *honorary distinctions of the first-class*, namely:—

1. *Frederick Adolphus Philbrick*, B.A., of Colchester, aged twenty-two, who served his clerkship to Mr. Frederick Blomfield Philbrick, of Colchester, and Messrs. Rixon, Son, and Anton, of 38, Cannon-street, London.

2. *William Melmoth Walters*, of 14, Hyde-park-gate South, Kensington-gore, aged twenty-two, who served his clerkship to Messrs. Walters, Roumieu, and Young, of Lincoln's-inn.

3. *John Park Robinson*, of Liverpool, aged twenty-three, who served his clerkship to Messrs. Lowndes, Robinson, and Bateson, of Liverpool.

The Council of the Incorporated Law Society have accordingly awarded the following prizes of books:—To *Mr. Philbrick*, one of the prizes of the Incorporated Law Society, and also, as a mark of peculiar distinction, the prize of the Honourable Society of Clifford's-inn; to *Mr. Walters*, one of the prizes of the Incorporated Law Society; and to *Mr. Robinson*, one of the prizes of the Incorporated Law Society.

The examiners have also certified that the following candidates passed examinations *nearly equal* to those who have been reported for prizes:—

1. *Henry Harper Geach*, of 35, Alwyne-road, Islington, aged twenty-one, who served his clerkship to Mr. Robert Walker Childs, of 25, Coleman-street, City.

2. *Arthur James Fitzhugh*, of Street, Sussex, aged twenty-three, who served his clerkship to Messrs.

Hoper, Greene, and Husey-Hunt, of Lewes, and Mr. William Francis Holcroft, of Sevenoaks, and Messrs. Loftus and Young, of New-inn, London.

3. *Charles Swinden*, of Birmingham, aged twenty-three, who served his clerkship to Mr. Robert Dolphin, of Birmingham, and Messrs. Sudlow, Torr, Janeway, and Tagart, of Bedford-row, London.

Omission by lessee to repair—No relief in equity.

Just as it was too late to notice in last number, we discovered (as stated in First Book, 136) that we had accidentally answered that part of No. IX. conveyancing which referred to non-repair erroneously; for it has been established by two rather recent cases, that courts of equity will *not* relieve a tenant who has, even from mere negligence, omitted to perform his covenants to repair (*Gregory v. Wilson*, 16 Jur. 304; *Hills v. Rowland*, 22 Law Journ. Ch. 964).

EDUCATION OF LAW STUDENTS.

There is no mistaking the signs of the times with respect to the education of the future members of the profession—at least of those who are to be solicitors. At the late important meeting at Leeds, respecting the scheme of examinations by the University of Oxford, and also at the last annual meeting of the Metropolitan and Provincial Law Association, this subject was amply discussed. At the former meeting Mr. J. Hope Shaw, in seconding the resolution proposed by Dr. Hook, approving of the university scheme of examinations, gave a professional application by making his observations refer to articled clerks. The speaker said he did not wish to confine himself to generalities, which (true and important as they were) were still vague, especially when his own profession afforded (what was much better) a useful practical illustration. He selected the illustration from his own profession, not because he thought that profession more important than others (though he was sure no soundly-judging man would dispute its importance), but because it was the one with whose wants he was best acquainted. He believed, however, the observations applicable to it were in a great, if not an equal degree, applicable also to the medical profession. In both cases there was an examination into the student's attainments in strictly professional knowledge, which insured considerable attention during the period of study, and at least protected the public against gross professional incompetence; but in the legal profession (and he believed in the medical one also) the test was limited to strictly professional, or what with reference to the present consideration he might call technical know-

ledge; there was no test, nor any special encouragement, for a good general education, which was hardly second in importance to knowledge of a more technical character. About thirty-five years ago, the Legislature endeavoured, to some extent, to supply this defect, as far as regarded the legal profession, by providing that a service of three years instead of five should suffice for youths who had taken the degree of Bachelor of Arts at Oxford, Cambridge, or Dublin University. But the expense attendant on the privilege had prevented all but a comparatively few out of a great number of well-educated youths from availing themselves of it. It had been used just enough to prove its advantage, and the necessity for its extension. In reference to university education, he had often heard it remarked by some of the most eminent members of their body, who had had pupils from the university, that those pupils learned their profession better in three years than an imperfectly educated youth did in five; and, though he had not had a university youth as a law student under his own charge, he could fully confirm the statement from his own observation of the superior promptitude with which youths well trained in their grammar-schools mastered the difficulties of legal science. So strongly had this been felt, that, during the last five or ten years, meeting after meeting of legal practitioners, not in London only, but in various parts of the kingdom, had been publicly avowing its importance, and only the previous day a meeting was held in London by the Council of the Incorporated Law Society (at which, but for the present meeting, he should have felt it his duty to attend) for the express purpose of urging the consideration of it upon the judges. But the advantage of general literary attainments was by no means confined to the legal profession. It would, he had no doubt, be equally felt in the medical profession, and in the walks of commercial life. And it was because it widely extended and powerfully strengthened the encouragement to those attainments, that the proposal of the University of Oxford was eminently entitled to that hearty approbation which the resolution expressed. Not having himself had the honour of belonging to the University, there was another reflection suggested by the subject which might, perhaps, come more appropriately from him than from one of its members. He hailed the proposal heartily, on account of the public benefit which he confidently anticipated from it; but he hailed it the more heartily because it would connect the university more and more with the general education of the people; and he believed, that, whilst it was thus widening its sphere of usefulness, it was materially strengthening its own foundations. He trusted that the sister University of Cambridge would not lag behind in this honourable

career, and that the two would in this, as they had in so many other instances, be fellow-labourers in the intellectual, as well as the religious and moral, improvement of the people.

Before concluding we may refer to an article in a recent number of the *Solicitors' Journal* upon the subject, and particularly referring to the proposed preliminary examination, as noticed *ante*, pp. 183—187.

"There can, we think, be no doubt that the great body of the profession is prepared to accept with approval the institution of a preliminary examination for articled clerks. The advantages are obvious and indisputable. It is greatly for the benefit of a solicitor, and indirectly for the benefit of the public, that he should have received a good education, and that he should have brought the results of his education into a definite shape. An examination will oblige his parents to furnish him with the means of learning, and it will oblige him to learn to some purpose. The whole character of the profession will be raised when no one can enter it unless he has turned his boyhood to some account; and thus the class, as well as the individual, will benefit by the arrangement. So far all are agreed. It is only when we come to particulars that differences obtrude themselves. We need scarcely say that no person already articled will be subjected to any examination, except the legal one through which he has to pass prior to his admission. But when we come to think how the examination should practically be carried on, many questions arise which it is not easy to meet at once. We have to consider the subjects of examination, and the time and mode of examining, the date in a clerk's career when the examination should take place, and the conditions under which the rules requiring an examination should be either partially or wholly relaxed.

"In June last, as most of our readers are aware, the Council of the Incorporated Law Society announced that they proposed 'to recommend to the judges to authorise an examination either before or during the articles of clerkship, or before admission, for the purpose of ascertaining that the candidate possessed an adequate knowledge of the Latin and French languages, and of English history, geography, arithmetic, and book-keeping.' The Council thus determined the subjects of examination, but not the time. On the subjects we have little to remark, for they are as well chosen, probably, as they could be, except, perhaps, that the requirement of book-keeping is of doubtful utility. It is required from candidates for admission to several of the departments of the civil service, but there has not, we believe, been found much use in exacting it. Youths who have had no opportunity of keeping books prac-

tically are obliged to cram up a very small amount of information on the subject from printed works; and all cram specially got up for an examination is worse than useless. But the proper time of examination is a most important question. We think that every consideration points to the expediency of establishing the general rule, that all clerks should be examined before they receive their articles. An examination in general subjects ought to show that a young man is fitted to become a clerk—not that he has spent the time of his clerkship well. We think it probable that the Council, by leaving the time undecided, really meant to leave open the settlement of exceptional cases, not to throw any doubt on the general rule. It is easy to see that there might arise exceptional cases where the time of examination might possibly be deferred, out of consideration for the circumstances of an individual. We will even go further. We think it is possible that, in some few cases, as, for instance, where the long services of an able and honest man are rewarded by the gift of articles from his master, it would be better to dispense with the examination altogether. It would be a great mistake to endanger the satisfactory working of the system by making it press too hardly on individuals whom the common sense of the profession would wish to see excepted from its operation. We think, therefore, that, somehow or other, there should be a dispensing power, to be jealously guarded and most cautiously exercised, but that, unless in cases clearly exceptional, every future clerk not yet articulated should be examined, prior to receiving his articles, in the subjects specified by the Council.

"The mode of conducting the examination is also a matter that deserves to be attentively weighed. It would be a considerable hardship to impose on young men the necessity of coming up to London for a week in order to pass an examination. There are many parents to whom the expense would be an inconvenience, and many others who would see with reluctance their sons go to the metropolis for so long a time, with, perhaps, no friend to watch over their conduct. On the other hand, it is difficult to make the examinations local. It would be a serious drain on the funds of the Law Society to send down special examiners: and it is not easy to see how any scheme of transmitting papers by post could be substituted. In the Civil Service this is done, because candidates for local subordinate situations can always be referred to some official superior in the district, who can be charged with seeing the examination properly conducted. But there would be no one to conduct the examination of a person wishing to enter a private profession. As a means of obviating the difficulty, we will venture to suggest that advantage

might be taken of the new system of examinations on the point of being established by the Universities of Oxford and Cambridge for persons not members of the Universities."

ARTICLED CLERKS.

Examination of articulated clerk—Refusal to examine—Mode of appeal.—By the 3rd of the Orders of Trinity Term, 1853, respecting the examination of articulated clerks, it is provided that in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate (i. e., a certificate testifying the clerk's fitness and capacity to act as an attorney), he shall be at liberty, within one month, to apply for admission by petition, in writing, to the judges, to be delivered to the clerk of the Lord Chief Justice of the Court of Queen's Bench, upon which no fee or gratuity shall be received, which application shall be heard in Serjeants' Inn Hall by not less than three of the judges. These rules were made under the provisions of the 6 & 7 Vic. c. 73. Where the examiners refused to proceed with the examination of an articulated clerk on account of certain charges affecting his personal character, the court refused to interfere, on the ground that his remedy was by petition to three judges, under the rules framed by virtue of the 6 & 7 Vic. c. 73. *Ex parte A. B.*, 30 Law Tim. Rep. 150.

Filing articles—Period of filing affidavit of due execution—Computation of time of service.—Articles of clerkship are required to be filed within six months of their execution, in order that the service should reckon from their date, for otherwise the service will reckon from the actual filing of the affidavit of execution. The affidavit of due execution of articles of clerkship is filed in due time if filed within six months after the execution of the articles by either of the parties. Where, therefore, the articles were sent to Bombay to be executed by the Master, and were there executed by him, and afterwards returned to England, and executed by the clerk, and the affidavit was filed within six months of execution by the latter, but not of the former: Held, that it was filed in due time. *Ex parte Leggett*, 30 Law Tim. Rep. 157.

Stamping articles [vol. 3, pp. 111, 177, 342; ante, pp. 35, 36]—*Delaying stamping of articles—Computation of time of service.*—The following decision fully confirms our views expressed ante, pp. 35, 36, as to the stamping of articles of clerkship under the 19 & 20 Vic. c. 81:—Mr. Justice Crompton has decided, that, although where, from accidental causes or unintentional neglect, articles of clerkship have not been stamped and registered within the six months, the court will permit the service of the clerk to be

computed from the date of the articles; yet, if it appear that the articles were left unstamped *intentionally*, even though with no improper motive, and so are not registered within the six months, the court will not interfere on behalf of the clerk. A. B., who was articulated to his father, was at that time in delicate health, and it being doubtful if he would be able to follow the profession, the articles were left unstamped for a year, when, it appearing that the clerk would be able to pursue his profession, an application was made to the Treasury for leave to have the articles stamped, which being granted, an application was then made to the Court of Queen's Bench that the period of the clerk's service might be computed from the date of the articles. *Ex parte Welch*, 30 Law Tim. Rep. 157.

Law Students' Corresponding Society.—The proposed meeting, noticed *ante*, pp. 180, 187, of the Law Students' Mutual Corresponding Society will take place in London, at Anderton's Hotel, Fleet-street, on the 21st instant.

SUMMARY OF DECISIONS.

EQUITY AND CONVEYANCING.

CHARITY.—*Mortmain*—*Will*—*Construction*—*Charitable bequest*—*Substitutional gift* [vol. 3, pp. 241, 283, 368; First Book, p. 97].—In the case of *The Attorney-General v. Tyndall* (2 Eden, 207), Lord Northington, amongst several propositions which he there laid down, expressed an opinion that a gift over, in case it should be found that the gift to the charity could not take effect, was void as being in fraud of the mortmain law, and intended merely in *terrorem* to prevent the heir from disputing it. There were three propositions determined by Lord Northington in that case, one in opposition to the view taken by Lord Hardwicke in *The Attorney-General v. Bowles* (3 Atk. 806), and with respect to which the current of decisions is stated to be confirmatory of Lord Northington's opinion. Lord Hardwicke, in *The Attorney-General v. Bowles*, held that a gift might be supported for the purpose of erecting an hospital, building a school, and the like, although no particular land was pointed out for that purpose, provided land could be found which would enable the erection to be made. Lord Northington held, that it could not be intended that the testator meant his trustees to go about begging for land, as he described it, and that the trust must be taken in its full sense, as if it had been the intention of the testator that they should purchase the land upon which the building was to be erected, and that view has been affirmed by subsequent decisions. The other two points decided by Lord Northington have certainly

not met with approbation; one was, that the case even of the building on land in mortmain was a transgression of the law, inasmuch as it improved the estate and made it more valuable—that has been overruled by a series of subsequent decisions; and the third point was, that a gift over, in the event of a charitable bequest failing for want of legality, was to be taken *in terrorem*, and also in fraud of the law as to mortmain. There is no decision following that; on the contrary, there is a decision by Sir John Leach directly opposed to it (see *De Themmines v. De Bonneval*, 5 Russ. 288). And in the following case it was held that a bequest to a charitable institution to be appropriated for the purposes of the charity is good if some of the objects are such as it can be legally applied to, although the purposes of the charity may comprise objects to purposes of the charity may comprise objects to which the bequest could not legally be applied. A testator, after bequeathing several legacies to charities, gave all his residuary estate to trustees upon trust for a charitable association; and by a codicil, after reciting that he had by his will, and other methods, disposed of parts of his personal estate to charitable uses, declared that, in case any parts of the same should be considered not to have their full operation, he bequeathed all such personal estate to the same trustees, free from any trust or condition, express or implied. The testator having afterwards attempted to dispose by deed of a sum of money for charitable purposes in a manner clearly void: Held, that this fund was included in the residuary bequest to the charity trustees, and also in the substitutional bequest contained in the codicil. *Semble*, if the bequest for the charitable association had been void, the substituted bequest to the same trustees would be good. *Carter v. Green*, 26 Law Journ. Ch. 845.

CHARITY.—*Will*—*Charitable bequest*—*Uncertainty*—*Trust*—*Power of disposal not exercised*.—Lord St. Leonards, in his work on Powers (vol. 2, p. 163), takes a distinction between *Harding v. Glyn* (1 Atk. 469), and *The Duke of Marlborough v. Godolphin* (2 Ves. 61), where Lord Hardwicke held that a legacy to the testator's wife for life, and after her death to be divided and distributed to and amongst such of his children, and in such manner and proportion as she should direct, was a mere power, and not a trust for the children in default of appointment; but he says "it should seem that if a case in the very terms of *The Duke of Marlborough v. Godolphin* were now to occur, it would be decided that the children took as tenants in common, in default of appointment." In *Doyley v. The Attorney-General* (4 Vin. Abr. 485), where the direction being to dispose of the testator's real and personal estate to such of his relation on his mother's side who were most

deserving, and in such manner as the trustees thought fit, and for such charitable uses and purposes as they should also think most proper and convenient, Sir Joseph Jekyll directed it to be divided, one-half to go to the next of kin *ex parte maternâ*, and the other moiety to a charity, and directed a scheme. This decision was followed by V. C. Wood in the following case:—A testator gave personal estate to his wife for life, and at her decease to be divided, one moiety thereof to the testator's daughter for life, and the other moiety to be at the disposal of his said wife, therewith to apply a part to the foundation of a charity school, or such other charitable endowment for the benefit of the poor of O. as she might think proper, and the remainder to be at her disposal among his relations, in such proportions as she might be pleased to direct. On the death of the testator's widow without having made any disposition of the latter moiety: Held, that one-half was well bequeathed for charitable purposes, and the other belonged to the next of kin. *Salisbury v. Denton*, 26 Law Journ. Ch. 851.

DEVISE.—*Fee upon a fee*—*Contingent remainder*—*Residuary clauses.*—In the following case it was argued that the residuary clause in the will in question could not operate as a devise of the ultimate reversion in fee, because it would be in violation of the rule of law that a fee cannot be limited on a fee. As observed by Mr. Justice Williams, the question is, what is the meaning of that rule when applied to this description of devise; and his lordship added, that the meaning of it is, that when the fee passes and vests, all after that cannot be good by way of remainder, but it may operate by way of executory devise. The fee, having been given, and having passed by the devise, there is nothing further for the testator's power of devising to operate on. The fee being outstanding, what becomes of it? That has been decided ever since *Purefoy v. Rogers* (2 W. Saund. 380). The notion of the fee being in abeyance cannot be sustained, but it descends on the heir-at-law. In the following case it appeared that there was a devise of land to E. for life, and after her decease, amongst all and every, or such one or more of the children of E., at such time and times, and in such parts, shares and proportions, manner and form, as E. should appoint, and for want of such appointment, amongst all and every the child and children of E. who should be living at her decease, and the issue of such of them as should be then dead, and to their heirs and assigns for ever, and for want of such issue, unto P. and to her heirs and assigns for ever. There was a residuary clause giving all the residue and remainder of the testatrix's estate and effects, whatsoever and wheresoever not therein-before disposed of, unto the said E., her heirs and

assigns for ever. E. and P. survived the testatrix. E. entered into possession of the land and died unmarried. During her lifetime she, by indentures of lease and release, conveyed the land to J. in fee. It was held, that the vested reversion in fee passed by the residuary devise to E., and that by the conveyance to J., the life estate and reversion both became vested in J. That the life estate, which was the particular estate on which the contingent remainder to P. depended, merged in the reversion, and the contingent remainder to P. was therefore destroyed. *Egerton v. Massey*, 6 Week. Rep. 130.

DISCOVERY.—*Compulsory arbitration*—*Common Law Procedure Act*, 1854, s. 3, 7 [vol. 1, p. 157].—A compulsory reference to arbitration under the 3rd section of the Common Law Procedure Act, 1854, is different from a reference by consent, and in such a case a bill of discovery, in aid of the proceedings before the arbitrator, will lie. *The British Empire Shipping Company (Limited) v. Somes*, 26 Law Journ. Ch. 759.

FEME COVERT.—*Acknowledgment by married woman* [vol. 3, pp. 210, 399]—*Fines and Recoveries Act*—*Requisites of affidavit.*—The Court of Common Pleas refused to allow a married woman living apart from her husband to convey certain property, taken under the will of her father, without the consent of her husband, the affidavit on which the application was made being defective in this—that it did not show that inquiries had been made to discover where the husband might be living. *Re Vine*, 30 Law Tim. Rep. 152.

JUDGMENT [vol. 1, pp. 339, 431; vol. 3, p. 40, 395].—*Lien*—*Construction of statute*—*Warrant of attorney*—*Order of common law judge*—*Usury, bills of exchange, &c., charging lands* [see vol. 2, p. 371].—The statute of Anne (stat. 2, c. 16, repealed by 17 & 18 Vic. c. 90; 1 Law Chron. 160), rendered void every loan of money at more than 5 per cent. interest; and then by the stat. 3 & 4 Will. 4, c. 58, s. 7, renewable bills and promissory notes, having not more than three months to run, were exempted from those laws; but by 7 Will. 4 and 1 Vic. c. 28, that exemption was extended to bills having not more than twelve months to run. That, however, was only a temporary act, and its place was afterwards supplied by 2 & 3 Vic. c. 37, s. 8, upon which the following case turned. The proviso in that act prevented a charge upon land being taken, as it might have been under the stat. of Will. 4 (see vol. 2, p. 371). Before the passing of 1 Vic. c. 110, it was considered that a judgment was not a security on land, but since the passing of that statute it clearly was so. Before that statute a judgment was often spoken of as a general lien on the general property of the debtor, but this only meant that by the writ of *elegit* the

creditor could get possession of the land, and the debtor could not withdraw his land from the effect of the writ. Before the stat. 1 & 2 Vic. c. 110, therefore, a judgment was not properly a security upon land; but that act gave a totally new quality and nature to a judgment. By the 13th section of that act a judgment was made a charge on all the lands of the debtor in the same way as if the debtor had, by writing under his hand, agreed to charge his lands (see vol. 2, p. 75—78.) A judgment, therefore, had not only retained its ancient quality, but also, by virtue of that statute, acquired the new quality of being a charge upon lands, and this effect was entirely independent of the intention of the parties. This view of the subject was confirmed by Lord St. Leonards, in the case of *Rolleston v. Moreton* (1 Con. and Laws. 252). There are several dicta of common law judges, in which a distinction is taken between a judgment and a warrant of attorney to confess judgment, the latter not being thought by them to be a security upon land properly speaking. But take the case of an agreement to give an equitable charge by deposit of deeds which were in the hands of some third person, and we have an exactly analogous case; for a warrant of attorney is an agreement that the creditor may, by entering up judgment, obtain a charge upon lands. Therefore the warrant of attorney to confess judgment, taken as a security for the repayment of money advanced at a usurious interest, was a security or charge upon lands within the meaning of the stat. 2 & 3 Vic. c. 37, s. 8. This view of the subject was confirmed by several cases, such as *Ex parte Knight* (1 Deac. 459); *Ex parte Warrington* (3 De G. Mac. and Gor. 159); and *James v. Rice* (Kay, 231). The grounds of the judgment of the House of Lords in *Lane v. Horlock* (5 Ho. Lds. Ca. 580), although at first sight apparently opposed to this decision, in reality, upon examination, will be found to confirm that view. Such is the language of V. C. Kindersley in the following case, where his Honour decided that, under the 1 & 2 Vic. c. 110, a judgment is a security upon land, just as if the debtor had by writing agreed to charge his lands, independent of the intention of the parties. Also that the warrant of attorney to confess judgment, taken as a security for the repayment of money advanced at usurious interest, is a security or charge upon lands within the meaning of 2 & 3 Vic. c. 37, s. 8. *Semble*, before 1 & 2 Vic. c. 110, a judgment creditor by *elegit* could get possession of lands, and the debtor could not withdraw them, but a judgment was not properly a security upon land. *Bond v. Bell*, 6 Week. Rep. 163.

JUDGMENT CREDITOR. — *Redemption of mortgage* — *Construction of 1 & 2 Vic. c. 110, s. 13.* — By the 1 & 2 Vic. c. 110, s. 13, no judgment

creditor is entitled to proceed in equity to obtain the benefit of the charge conferred by his judgment until one year after the judgment has been entered up. In the following case, V. C. Stuart held, that the rule that no judgment creditor is to proceed in equity until one year after the judgment has been entered up, does not extend to the case of a bill by a tenant by *elegit* to redeem a mortgage. *Barnes v. Thrupp*, 30 Law Tim. Rep. 145.

LEGACY. — *Ademption* — *Varied property* — *Stocks, bonds, &c.* — A general gift, with a cumulative description, will include property which has been varied between the date of the will and the death of the testator. A bequest of bank stock was held to pass £3½ per cent. annuities, no other stock being standing in the name of the testator, either when he made his will or at his death. A bequest of eight Russian bonds, purchased by L., his broker, was held to pass different Russian bonds, purchased through another broker. A bequest of "my property not in England, in the hands of my attorney abroad, W., consisting of Russian bonds," was held to pass bonds of the Hamburg Fire Company, which had been purchased with the produce of the Russian bonds by another agent abroad. *Drake v. Martin*, 26 Law Journ. Ch. 786.

MORTGAGE. — *Mortgage with power of sale* — *Sale under special contract* — *Part of purchase-money left on mortgage of the hereditaments sold.* — A mortgagee with power of sale is not bound to wait till a more advantageous sale can be effected; neither is he bound to advertise before proceeding to a sale. Lands were mortgaged in fee, with power of sale by auction or private contract in case of default in payment of the mortgage money. The mortgagee sold part of the property by private contract, containing an agreement that more than half of the purchase-money might remain on mortgage of the land sold, for four years, if interest should be regularly paid; and that if a stated sum were laid out on the land in the erection of houses within a specified time, the mortgage money might remain for a longer stated period. On a bill filed by the owner of the equity of redemption to redeem and set aside the sale: Held, that (there being no fraud nor inadequacy of price) the transaction could not be impeached, and the bill was dismissed with costs. *Davey v. Durrant*, 26 Law Journ. Ch. 830.

PARTNERS. — *Stockbrokers* — *Responsibility* — *Customer.* — A firm of stockbrokers purchasing on behalf of a customer foreign securities passing by delivery, which, in their usual course of dealing they retained in their own custody, are jointly and severally liable to make good the same if lost or misapplied. Where, therefore, one of the partners, who

was a trustee of a marriage settlement, under instructions to the firm, not only bought the foreign securities, but also individually transacted all the business of the customer with the firm, and finally applied them for his own purposes, not wholly unconnected with the firm: Held, that the securities were in the custody of the firm, and not of the trustee; that the firm was responsible for them, whether lost or misapplied; and the, trustee having absconded and become bankrupt, that the remaining partners must replace the securities. *The Marchioness de Ribeyre v. Barclay*, 26 Law Journ. Ch. 747.

POWER OF SALE.—*To trustees and heirs—Assigns.*—A power of sale given to trustees and the survivors and survivor of them, his heirs and assigns, may be exercised by the devisees of the surviving trustee. *Hall v. May*, 26 Law Journ. Ch. 791.

PRINCIPAL AND SURETY [vol. 3, p. 202, 224, 262].—*Compromise—Release.*—The reason on which the rule of equity between principal and surety as to giving time to the principal being the discharge of the surety, was stated by Lord Eldon thus, in *Samuel v. Howarth* (3 Mer. 272, 278): "The rule is this, that if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety—that is, if time is given by virtue of positive contract between the creditor and the principal, not where the creditor is merely inactive. And in the case put, the surety is held to be discharged for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract. But this rule does not apply where the surety has taken the debt on himself absolutely. In the following case, it appeared that a creditor obtained a judgment against the principal debtors, and sued out execution against them. They presented a petition of insolvency, and were discharged by the creditor, upon terms by which they abandoned the business in which their liabilities were contracted: Held, that this would not discharge a party who, as surety for the debts, had been previously sued, and had entered into agreements for liquidating the demands against him, arising out of the liabilities of the firm. *Reade v. Lowndes*, 26 Law Journ. Ch. 793.

PUBLIC COMPANY.—*Railway Clauses Consolidation Act*, 8 & 9 Vic. c. 20, s. 68—*Lands Clauses Consolidation Act*, 8 & 9 Vic. c. 18, ss. 93, 94—*Construction—Accommodation works—Small portions of intersected land—Land "situate in a town, or built*

upon."—The 68th section of the Railway Clauses Consolidation Act, 1845, irrespective of the claim for compensation, gives a proprietor whose lands have been divided, a right to such bridge, or other means of communication, as may be necessary for the purpose of making good any interruption caused by the railway to the use of the land through which it is made. A railway intersects the land of M., such land coming under the alternative of being either "land situate within a town," or "land built upon;" one portion is less than half a statute acre. M. can compel the company to make a communication between the intersected portions of his land, such a case falling under the provisions of 8 & 9 Vic. c. 20, s. 68 (Railway Clauses Consolidation Act), and not being affected by 8 & 9 Vic. c. 18, ss. 93, 94 (Lands Clauses Consolidation Act). The words "such land," in s. 94 of 8 & 9 Vic. c. 18, refer to "land not being situate in a town or built upon," in s. 93 in the same act, and not to "small portions of intersected land" generally mentioned in the short preamble to these two sections. *Marriage v. The Eastern Counties and London and Blackwall Railway Company*, 6 Week. Rep. 131.

SOLICITOR AND CLIENT.—*Power of attorney to compromise a suit—Acquiescence.*—The following is a fuller statement of the decision of the Master of the Rolls as to the authority of a solicitor to compromise a suit (*ante*, p. 211). A solicitor employed to conduct a cause has implied authority to do everything that is necessary in the conduct and management of the cause; but he has no implied authority to compromise it. A compromise is nothing more than a sale of the subject-matter of the suit by one party to the other; and as a solicitor, acting within the scope of his authority, has no power to sell the subject-matter of the suit to a stranger, so he has no power to sell it to the other side. How far the subsequent acts of the client amounted, in the case presently referred to, to acquiescence considered. The principles upon which the court acts in consent cases stated. *Swinfen v. Swinfen*, 3 Jur. N. S. 1109.

PURCHASE SUBJECT TO MORTGAGE.—*Notice of mortgages prior to completing—Redemption of mortgage—Sale of mortgaged estate subject to charges—Completion of purchase—Notice.*—The following decision shows the effect of a notice of incumbrances to a purchaser prior to the payment of his purchase-money:—T. being possessed of a leasehold messuage and premises, on which he had created several charges, contracted to sell the same to O.; and by a deed, dated 4th August, 1855, the premises were assigned to O. for the residue of the term, subject to a mortgage thereon to L. Besides L.'s mortgage, there were equitable charges in the hands of a second and third incumbrancer. On the same day,

Saturday, 4th August, O. handed to T. a cheque, drawn by the firm of which he was partner, upon their private bankers, for the amount of the purchase. Afterwards, fearing that the insurance might not have been paid, or that interest on L.'s mortgage might be in arrear, O. stopped payment of the cheque before the following Monday morning. On the 8th August, however, O. was induced to withdraw his countermand, and the money was paid on the same day. On the day before the 7th, O. had been made acquainted with "the existence of the second and third incumbrances." The bill was filed by the third incumbrancer, praying to be allowed to redeem the first and second, and that O. might redeem him. The plaintiff contended that the purchase was not completed on the 4th August by delivery of the cheque, and that before the 8th August, O. had notice of the second and third charges. O. contended that the purchase was complete on the 4th August, and asserted his right to redeem L. in priority to the plaintiff: Held, that the purchase was not completed on the 4th August by delivery of the cheque, considering the circumstances that took place afterwards, and decree made in conformity with the prayer of the bill. *Tudsey v. Lodge*, 30 Law Tim. Rep. 29.

EQUITY PRACTICE.

COSTS.—*Further answer unnecessarily required.*—The costs of a further answer, which had been vexatiously required, ordered, at the first hearing of a foreclosure suit, to be paid by the plaintiff: the defendant having taken the objection, and asked for his costs, upon the face of his further answer. Similar costs of another defendant, who had not raised the objection in his second answer, not ordered to be so paid. *Cocks v. Stanley*, 6 Week. Rep. 45.

DECREE [vol. 3, pp. 192, 257].—*Vacating Inrolment—Abatement—Haste.*—In a suit against several defendants one died, and, before revivor against his executor, another defendant obtained, on May 8, an order to dismiss for want of prosecution, and inrolled it on June 30. The Court refused to vacate the inrolment on the ground of the abatement of the suit at the date of the order, or on the ground of the haste with which the inrolment had been made. *Williams v. Page*, 26 Law Journ. Ch. 813.

DECREE [vol. 3, pp. 192, 257].—*Vacating Inrolment—Misleading party.*—If the conduct of the party inrolling a decree has been such, as reasonably to mislead the other party into the belief that he would not inrol, even though there may be no *mala fides*, the court will vacate the inrolment. *Backhouse v. Wylde*, 26 Law Journ. Ch. 812.

DISMISSAL OF BILL.—*For want of prosecution—Delay—Injunction ordered to stand over, plaintiff bringing action.*—After a delay of twelve months, in which no step has been taken by the plaintiff, notwithstanding an admission by the defendant's answer that he is using the article complained of by the plaintiff, and after notice, on Aug. 1, by the defendant, that he would move to dismiss in Michaelmas Term for want of prosecution, and still no steps taken, the bill was dismissed, with costs, for want of prosecution accordingly. An interlocutory order, on motion for an injunction directing the motion to stand over, the plaintiff to bring an action with liberty to apply, is not an order which, like a decretal order, will prevent time running so as to affect the defendant's right to move to dismiss for want of prosecution. *Baker v. McClellan*, 3 Jur. N. S. 1169.

NEXT FRIEND [vol. 3, p. 390].—*Married woman—Co-defendant—Suspicion of insolvency.*—Facts amounting to suspicion of insolvency of a next friend for a married woman will not, in opposition to his own oath, as to his solvency, disqualify him from acting as next friend. A co-defendant with a married woman may act as her next friend on an appeal by her. *Elliott v. Ince*, 26 Law Journ. Ch. 821.

PETITION OF RIGHT [First Book, p. 53].—In the place of the usual commission issued on a petition of right, the court, with the assent of the Attorney-General, issued a formal commission, the return to which was to be made on the oath of the petitioner. *Ex parte Carl Robert v. Frantzins*, 26 Law Journ. Ch. 797.

PUBLIC COMPANY.—*Winding-up Amendment Act of 1857—Action with leave of judge in equity.*—The 7th section of the 20 & 21 Vic. c. 78 (ordinarily termed the British Bank Compromise Act), provides that when any company shall have been adjudicated bankrupt, then after the appointment of assignees, or if not, then after the judge or master shall have advertised for creditors to appoint a representative, no action shall be brought, or execution or *scire facias* issued or proceeded with, against the person, property, or effects of any member of such company, except by leave of the Court of Bankruptcy, or of the said master or judge before whom such order shall have been made. Where it is necessary, under the 7th section of 20 & 21 Vic. c. 78, to obtain leave to issue a *scire facias*, the application must be to the judge in chambers. A motion in court for such leave refused. *Powis v. Butler*, 6 Week. Rep. 34.

COMMON LAW.

ATTORNEY AND CLIENT.—*Gounsel's opinion—How far it justifies—Fraudulent representation—Form of action—Special count on indebitatus—Damage,*

general or special—Bona fides.—The following is an important case, with reference to an attorney's duty in laying cases, instructions, or other documents before counsel, and obtaining and acting on opinions obtained on incorrect statements, it having been held, that in an action against an attorney, or any other party, for a malicious or fraudulent proceeding, it is not enough to excuse the defendant that he acted on counsel's opinion, unless he also shows a case fairly stated and advice obtained *bonâ fide* and properly pursued; and in an action against an attorney for fraudulently obtaining, on behalf of a third party pretending to be plaintiff's partner, debts due to the plaintiff, it was held no answer on the part of the defendant to show that he had, upon oral statements, suppressing material facts known to himself, obtained counsel's opinion that there was a partnership, and that the proper course was to write to the customers on behalf of the firm, warning them not to pay the plaintiff, he having written letters to them on behalf of the plaintiff and the pretended partner requesting payment. It was also held, that the right question for the jury was, whether the letters were fairly written in consequence of counsel's opinion that the defendant might legally use the plaintiff's name, or whether they were written really in order to induce the customers to believe that the plaintiff actually authorised the defendant to write such letters and to receive payment. And the jury having found the latter to be the case, it was held, that the evidence warranted their finding, and sustained a verdict for the plaintiff on a special count, for falsely and fraudulently obtaining, by the use of the plaintiff's name, payment of debts due to him, or on an indebitatus count for money had and received, the defendant being clearly liable in some form of action to repay to the plaintiff the moneys so received. And the judge having so directed the jury, and told them that they might, under one count or the other, give a verdict for the plaintiff to the amount of the moneys received, this was held no misdirection. *Quære*, however, as to the precise form in which the moneys were recoverable, whether as special or general damage under the special count, or as money received to the plaintiff's use. *Semble*, per Pollock, C. B., under the latter count; per Martin, B., as general damage; per Bramwell, B., as special damage under the special count. *Andrew v. Hawley*, 26 Law Journ. Ex. 323.

ATTORNEY AND CLIENT.—*Liability of attorney—Trial—Skilled witness.*—An attorney, being in the position of an agent for his client, is not liable for the charges or expenses of a skilled witness, retained by him, in pursuance of his general instructions, to make surveys, researches, calculations, or experiments, with a view to examination as a witness

in his client's cause. The client, in such a case, is *primâ facie* liable; and although it is competent to the attorney to make himself personally liable to pay the charges, there must be evidence of an express undertaking on his part so to do; and the mere fact that the attorney has employed the witness in such a way, and that in the course and conduct of the case he has had communications with the skilled witness, that being in the course of his business as the attorney, is no evidence of such an undertaking. *Lee v. Everest*, 26 Law Journ. Ex. 334.

BILL OF EXCHANGE.—*Foreign stamp—Statute 17 & 18 Vic. c. 83, s. 5* [stated 1 Law Chron., pp. 150, 151].—The statute 17 & 18 Vic. c. 83, s. 5, enacts that the holder of an unstamped bill of exchange drawn out of the United Kingdom shall affix an adhesive stamp before he shall present the same for payment, or indorse, transfer, or in any manner negotiate such bill; and further provides, that "no person who shall take or receive from any other person any such bill as aforesaid, either in payment or as a security, or by purchase or otherwise, shall be entitled to recover thereon, or to make the same available for any purpose whatever, unless at the time when he shall so take or receive such bill, there shall be such stamp as aforesaid affixed thereon," does not apply to a bill of exchange or note indorsed abroad and sent by the payee to his agent in England for the purpose of being presented for acceptance, nor to such presentment for acceptance; and therefore, on the non-acceptance and protest of such bill, an action may be maintained by the indorsee against the drawer without a stamp being affixed. *Quære*, whether on issues on pleas only denying the presentment for acceptance and notice of dishonour, the plaintiff is bound to produce the bill of exchange. *Sharpley v. Rickard*, 26 Law Journ. Ex. 302.

CHEQUES CROSSED.—19 & 20 Vic. c. 25 [see vol. 2, p. 269; 3 *Id.* 25, 100, 210].—It had been thought that the 19 & 20 Vic. (3 Law Chron. 25) had put an end to all difficulties arising out of the custom of crossing cheques, but the following case shows that this is not the case, the Court of Common Pleas having held that the crossing on the cheque forms no part of the instrument; and, if obliterated before presentment to the banker, the latter is safe though he pay the money to a person not being a banker. A subscription has been made for the purpose of enabling the plaintiff to carry the case to a court of error. The court considered that the enactment in the statute to the effect that the addition, in that statute mentioned, across the face of a draft on a banker, shall have the force of a direction to the bankers that the same is to be paid only to or through some banker, &c., does not apply to the time when the draught is issued, but to the time

when it is presented; therefore, where a crossing made by the drawer was before presentment fraudulently erased, and the bankers, without negligence, paid it over the counter, and not to or through a banker, they were held entitled to debit the amount to the drawers. The crossing is no part of the cheque, and therefore the erasure of it cannot amount to forgery of another and different cheque (Cockburn, C. J., *dubitante*). *Simmonds v. Tayler*, 6 Week. Rep. 134.

CHEQUES.—*Presentment—Reasonable time for—Six years.*—In the following case, Mr. Justice Cresswell (delivering the judgment of the Court of Queen's Bench) held that no time less than six years is unreasonable within which to present a cheque, unless some loss was occasioned by the delay, recognising *Robinson v. Hawksford* (9 Q. B. R. 52); and per Tindal, C. J., in *Alexander v. Burchfield* (7 M. & G. 10—67). *Laws v. Rand*, 6 Week. Rep. 127.

CORPORATION.—*Contract by, not under seal, nor of a mercantile nature* [*ante*, pp. 149—152, 213].—We have noticed, at some length, the case of *Ernest v. Nicholls* (*ante*, pp. 149—152), but not at all disproportioned to its importance; we have also noticed an Irish case on the same subject (*ante*, p. 213), viz. the contracts of corporation being under seal or not (and see *First Book*, p. 96). We now have to notice a still more recent case in the Court of Queen's Bench, in which Lord Campbell, delivering the judgment of the court, said, that, although a trading corporation may have power to enter into a binding contract not under seal to carry on the trade for which it is constituted, a parol contract to sell the business of the company, and to put an end to this trading, would certainly be void. His lordship added, that Lord Wensleydale, obiter, had observed that he disapproved of the decisions of the Court of Queen's Bench upon this subject; but he himself said, "It is quite unnecessary to discuss this point now, because this is not a question about goods supplied or services performed in the way of trade in the ordinary course, but a question as to a special contract to do the very unusual thing of purchasing by one company the trade of another." The point decided by the Court of Queen's Bench was, that the acceptance of a contract by a corporation aggregate must be under seal, where it is not a contract with a customer of the company, nor of a mercantile nature, nor one which could not be under seal, as becoming a party to a bill of exchange. *London Docks Company v. Sinnott*, 6 Week. Rep. 165.

COSTS.—*Action for—Interlocutory order for costs—How enforceable.*—The general rule applicable to the liability of a party to costs on interlocutory and collateral proceedings, is that such liability depends solely on the order of the court, and that order can

only be enforced by attachment. It is not like a decree or judgment upon which an action may be maintained, as in *Russell v. Smith*, and *Henderson v. Henderson* (6 Q. B. Rep. 288; 13 Law Journ. Rep. Q. B. 274; see 3 Law Chron. 73, 261). In the following case it appeared that a motion made by the defendants in the Court of Queen's Bench in Ireland to set aside the proceedings, was dismissed with costs to the plaintiff: Held, that no action would lie for those costs, and that the order awarding them could only be enforced by attachment. *Sheehy v. The Professional Life Assurance Company*, 26 Law Journ. C. P. 301.

HUSBAND AND WIFE [vol. 2, pp. 178, 375].—*Agency—Necessaries for children—Adultery.*—The following will illustrate the statement in the "First Book," p. 110, that "if a wife elopes or lives with another man, the husband is not chargeable even for necessaries;" as Chief Justice Cockburn said, "If a woman be living with a man as her husband, credit would be given to that man." It appeared that the defendant went abroad, but provided his wife with a sufficient allowance for the support of their children, and the wife afterwards lived in adultery with another man, and the plaintiff was called in as a medical man to attend the children: Held, that he could not recover against the defendant; and that the wife had no general authority, either as wife or agent, to bind the defendant for necessaries for the children. *Atkyns v. Pearce*, 26 Law Journ. C. P. 252.

LANDLORD.—*Repairs; breach of covenant—Measure of damages* [vol. 3, pp. 259, 398].—A. covenanted with B. to keep certain premises in repair, but allowed them to become dilapidated, and the cost of repair would amount to £40. B. had covenanted with C. (the ground landlord) duly to pay rent, which he had failed to pay, so that B's reversion may have been forfeited and of no value: Held, in action by B. against A., that the damages should be what it would cost to put the premises in repair—not what might be the value of B's reversionary interest in the premises. *Davies v. Underwood*, 30 Law Tim. Rep. 154; 6 Week. Rep. 105.

LANDLORD AND TENANT.—*Lease—Breach of covenant—Forfeiture* [vol. 3, p. 19].—*Waiver—Licence.*—Where a breach of covenant has continued for upwards of twenty years, and rent has been received, that fact should be put to the jury to say whether they were not of opinion that there was a licence by the lessor to use the premises in the manner complained of. *Gibson v. Doey*, 30 Law Tim. Rep. 156; 6 Week. Rep. 107.

LANDLORD AND TENANT.—*Agreement for a lease—Ambiguity in material part of subject-matter—Uncertainty of duration of term—Tenancy from year to year.*—Although it may be that where an actual

demise is made generally, at a yearly rent, and nothing is said as to the duration of the term, a tenancy from year to year would be implied, yet where, from the terms of an agreement for a lease, coupled with surrounding circumstances, it is ambiguous what term is intended to be conveyed, such agreement is void for uncertainty. *Fitzmaurice v. Bayley*, 6 Week. Rep. 125.

LANDLORD AND TENANT [vol. 2, p. 163].—*Estoppel—Trespass—Constructive eviction*.—The rule by which a tenant is estopped from denying the title of the landlord who let him into possession is applicable in an action of trespass as well as in ejectment, qualifying the dictum of Pollock, C. B., in *Watson v. Lane* (25 Law Journ. Exch. 102). Payment by a tenant of rent to a person other than the person who let him into possession under a threat of expulsion, does not amount to a constructive eviction so as to affect the estoppel. *Semble*, that there cannot be a constructive eviction for that purpose. *Delaney v. Fox*, 26 Law Journ. C. P. 248.

LANDLORD AND TENANT.—*Receiver appointed by court of equity—Attornment*.—An attornment by a tenant of land to a receiver appointed by the Court of Chancery to collect the rents, and payment of rent to such receiver, create a tenancy by estoppel between the tenant and receiver, but do not enure to enable the person who is found ultimately to have the legal title to the land to treat the tenant as his tenant, and to distrain for rent. *Evans v. Matthias*, 26 Law Journ. Q. B. 309.

MASTER AND SERVANT.—*Master's liability for accident to servant* [vol. 3, pp. 387, 400].—Where a master builder personally interferes and directs his workmen to make a scaffolding out of poles which he knows to be unsound, he is liable to make compensation if the scaffolding gives way, and a workman upon it in his employ, who has no notice of the unsoundness, is injured thereby. *Roberts v. Smith*, 26 Law Journ. Ex. 319.

NEGLIGENCE [ante, p. 214].—*Collision of ships* [vol. 3, pp. 51, 155, 223, 316, 322].—*Contribution of plaintiff—Negligence by plaintiff—Breach of statutory rule*—17 & 18 Vic. c. 104, ss. 296, 298.—With respect to actions arising out of torts for injuries to person or property by the defendant's negligence, in the case of *Dowell v. The General Steam Navigation Company* (5 El. & B. 195; 26 Law Journ. Q. B. 59), Lord Campbell says: "In some cases there may have been negligence on the part of a plaintiff remotely connected with the accident, and in these cases the question arises whether the defendant by the exercise of ordinary care and skill might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often quoted donkey case, *Davis v. Mann* (10 Mee & W.

545; 12 Law Journ. Rep. Q. B. 449). There, although without the negligence of the plaintiff, the accident could not have happened, this negligence is not supposed to have contributed to the accident within the rule upon this subject; and if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he, and he only, proximately causing the loss." The 296th section of the Merchant Shipping Act provides a rule for the conduct of ships meeting each other, and this rule is to be obeyed by all ships unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger. The 298th section provides that if in any case of collision it appears that such collision was occasioned by the non-observance of the above rule, the owner of the ship by which such rule has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary: Held, that these two sections do not absolutely bar the owner of a vessel infringing such rule at the time of the accident from recovering compensation, but that the effect is to bring a non-compliance with the rule within the category of negligence. Where in a case of collision there appeared to have been negligence on both sides, and the plaintiff did not obey the rule of section 296, and the judge told the jury that if there was no negligence on the part of the defendant, or if the plaintiff directly contributed to the collision, they should find for the defendant; but if the defendant directly caused it, they should find for the plaintiff: Held, a proper direction. *Tuff v. Warman*, 26 Law Journ. C. P. 263.

PARLIAMENT.—*Appeal from court of revising barrister—Notice of claim, no proof requisite*.—When the overseers have published the name of a claimant in the list of claimants, the revising barrister has only to require proof of the qualification, and cannot call upon the claimant to prove his notice of claim, that being a matter for the overseer, in which he exercises a judicial office. *Davies v. Hopkins*, 30 Law Tim. Rep. 152.

PUBLIC COMPANY.—*Money had and received—Failure of consideration—Abortive scheme—Recovery of deposit—Mine worked on cost-book principle* [vol. 3, pp. 21, 42].—*Evidence*.—The rule that enables a depositor to recover his deposit upon a scheme proving abortive is not affected by the fact of that scheme being a company established for the working of a mine on the cost-book principle. A. and others, directors and managing committee

of a proposed company, issue a prospectus in which their names appear as such directors and committee, and that of L. and Co., as bankers. By a resolution also of the same directors and others, promoters of the scheme, at a meeting held for that purpose, L. and Co. were appointed bankers to the company, with whom an account was to be opened, in the names of the directors, and all moneys were to be paid into that account. At the same meeting it was also resolved that the company should be carried on by certain rules, by one of which it was arranged that "all payments due from shareholders and all moneys of the company should be paid into the hands of the bankers, to the account of the directors of the company." B. afterwards applies for shares, and pays a deposit which is entered by the bankers to the account of some only of the directors, and not of all. The scheme then becomes abortive: Held, that the rules and prospectus were evidence to fix all the directors with money had and received to the use of B. *Johnson v. Goslet*, 6 Week. Rep. 127.

SHIPPING.—*Policy of insurance—Memorandum—Goods—General description—"Master's effects"—Total loss of some articles.*—Where articles essentially different in nature and kind are insured under a general description as "master's effects," warranted free from all average, the warranty is divisible, and means that the insurers are not to be liable for any partial loss, but are to be liable for a total loss of any of the specific articles insured under that description. Therefore, where the master of a vessel which was lost, having effected such a policy, saved his chronometer and a few other articles, but the rest of his effects were totally lost: Held, that he was entitled to recover against the underwriters the value of the articles lost. *Duff v. Mackenzie*, 26 Law Journ. C. P. 313.

TENANTS IN COMMON.—*Wall between adjoining houses—Action against co-tenant—Ouster.*—One tenant in common of lands, &c., can maintain an action of trespass against his co-tenant if there has been an ouster; but otherwise not (Litt. s. 323, note; Bacon's Abr. "Estate," K. 8). The plaintiff and defendant were owners of adjoining premises. The defendant erected a building against the wall which divided their premises, and carried up a chimney upon the wall. On the trial of an action for this, as an obstruction to the plaintiff's wall, the judge told the jury to find for the defendant if they thought the plaintiff and defendant were tenants in common of the wall. The jury found for the defendant on this ground: Held, a misdirection, as there was evidence of ouster, which, if found by the jury, would have entitled the plaintiff to a verdict against the defendant, though his co-tenant. *Stedman v. Smith*, 26 Law Journ. Q. B. 214.

WATERCOURSE [vol. 3, p. 305].—*Easement—Action by licensee against stranger for pollution of an artificial watercourse—Possession of the use of a stream, how far sufficient to sustain an action against a wrongdoer.*—The following is a more full statement of the decision noticed at p. 91:—Although it may be questionable whether a party merely licensed by the owner of a stream to use the water has such a possessory right to the water as to maintain an action for fouling it, yet if he, by the owner's permission, has caused the stream to flow into his own pipes or cisterns on his own premises, he can then maintain such action, supposing the defendant had no right to foul the water, and the fouled water has caused damage to the plaintiff. And it will be no objection to the action that the actual injury to the plaintiff has been caused by his use of the fouled water in his boilers, &c.; for the principle that a party cannot recover for an injury to which he has himself contributed does not apply where the act of the defendant has been wrongful and wilful, and the act of the plaintiff, which has contributed to the actual injury, has been something he was lawfully entitled to do. *Whaley v. Laing*, 26 Law Journ. Ex. 327.

COMMON LAW PRACTICE.

AMENDMENT [vol. 1, pp. 16, 310, 418; vol. 2, p. 376].—*Misjoinder—Variance—Amendment "at the trial"*—*Common Law Procedure Act, 1852* (15 & 16 Vic. c. 76), ss. 27 and 222—[stated 1 Law Chron. p. 16].—The 222nd section of the *Common Law Procedure Act, 1852*, which enables a judge to amend all defects and errors in proceedings in civil causes, does not apply to cases of misjoinder of parties. The 37th section, which enables a judge to amend a misjoinder of defendants, as a variance, at the trial, does not apply to a case where a defendant has been joined, not by mistake, but for the purpose of trying his liability. *Semble*, "at the trial" means before verdict. In an action of contract against two defendants, the jury having found that one only was liable, the plaintiff's counsel, who throughout the trial contended that both were liable, thereupon and before the verdict was recorded, applied for leave to amend by striking out the name of the other: Held, that the judge was right in refusing to allow the amendment to be made. *Wickens v. Steel*, 26 Law Journ. C. P. 241.

ARBITRATION.—*Reference under sec. 3 of Common Law Procedure Act, 1854* [vol. 1, p. 157]—*Fraud alleged, to be decided by master.*—By sec. 3 of the *Common Law Procedure Act, 1854*, "if it be made to appear at any time after the issuing of the writ to the satisfaction of the court or a judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere

account, which cannot conveniently be tried in the ordinary way, it shall be lawful for such court or judge, upon such application, if they or he think fit, to decide such matter in a summary way, or to order that such matter, either wholly or in part, be referred to an arbitrator, appointed by the parties, or to an officer of the court, or, in country causes, to," &c. And the decision or order of such court or judge, or the award on certificate of such referee, shall be enforceable by the same process as the finding of the jury upon the matter referred" (vol. 1, p. 157). Where a matter is referred to a master under the above section, he must decide, as an arbitrator would have done before the act was passed, according to all the ordinary modes; and where one party alleges that a settlement of account has been obtained by fraud, the master must consider and decide upon the alleged fraud. *Innull v. Moorgen*, 30 Law Tim. Rep. 153.

ARBITRATION [*ante*, pp. 27, 55, 93].—*Reference of action in the name of a firm—Liability of retired partner without notice—Not enforced by attachment.*—The court will not grant an attachment, or make absolute a rule for payment of money found due by an award against a person who was made a party to the action, which was referred without his consent, and who did not authorise the action which was referred, nor the reference to arbitration, and had no notice of it until after the award; and, although he might be liable in law on an implied authority, by reason of the action and reference relating to partnership transactions in a firm of which he was a member, yet, if it appears that he then had retired from the firm, the applicant will be left to enforce the award in an action, and the court will not enforce it by the exercise of a summary jurisdiction. *Robertson v. Hatton*, 26 Law Journ. Ex. 293.

ARBITRATION.—*Compulsory reference under the Common Law Procedure Act, 1854* [*ante*, p. 27].—*Power of the court to amend the particulars of demand* [vol. 2, pp. 52, 164, 225].—When, on the application of a plaintiff, a compulsory order of reference of the action has been made under the Common Law Procedure Act, 1854 (vol. 1, pp. 157, 158), the court has power, at any time before the award, to amend the particulars of demand. *Gibbs v. Knightley*, 26 Law Journ. Ex. 294.

ARREST [*ante*, p. 124].—*Privilege from* [vol. 3, p. 158].—*Metropolitan police court—Prosecutor and witness.*—The court of a magistrate is a court where, the magistrate having begun an inquiry, a witness coming before it is entitled to the privilege which the law has usually given to a person coming before a court for the administration of justice. In the following case, it appeared that the now defendant

gave information at a metropolitan police court, charging certain persons with felony. Those persons subsequently appeared at the court, and the magistrate remanded them to a future day, when the now defendant appeared as prosecutor and witness. The magistrate made another remand, adjourning the hearing to another day; and the now defendant, on leaving the court, was arrested on a *capias ad satisfaciendum*: Held, that, he was privileged from such arrest. *Mountague v. Harrison*, 30 Law Tim. Rep. 135; 6 Week. Rep. 43.

ARREST [*ante*, pp. 124, 218].—*Sheriff* [*ante*, p. 93].—*Legality of arrest—Detainer after illegal arrest.*—When the sheriff has a defendant in custody, in circumstances which make the custody illegal, as between the sheriff and the party detained, and so entitle the latter to be discharged, the sheriff is bound to discharge him, whatever valid writs the sheriff may have held at the time of the illegal arrest, or which he may have received during the illegal imprisonment. The sheriff is not to be considered merely as the agent of those who put writs into his hands for execution. Distinction on this between writs against the person and against goods. *Hooper v. Lane*, 6 Week. Rep. 146.

INTERROGATORIES [vol. 3, pp. 47, 53, 307, 326].—17 & 18 Vic. c. 122, s. 51 [stated vol. 1, p. 160].—*Intention of act—What interrogatories granted.*—The intention of the 51st section of the Common Law Procedure Act, 1854, in permitting parties to deliver interrogatories to their adversaries, was to prevent the necessity of going to a court of equity; and its provisions are applicable when either party to an action has a specific case which he wishes to set up, and some of the material for making it out are in the possession of his adversary; but not when his object is to discover how his adversary is going to shape his case, or to see whether there are any defects in it, or to fish for a defence. Interrogatories, too, which are put for the purpose of contradicting a written instrument, are inadmissible. *Moor v. Roberts*, 26 Law Journ. C. P. 246.

VENUE.—*Local action by statute—Power of court to change—Public Health Act.*—The 11 & 12 Vic. c. 63, s. 139, directs that actions brought against persons acting under, and in execution of, that act (the Public Health Act) "shall be tried in the county or place where the cause occurred, and not elsewhere;" Held, that this meant "and not elsewhere, unless there be a special order of the court to the contrary;" and that the common law jurisdiction of the courts to change the venue was not taken away. *The Itchin Bridge Co. v. The Local Board of Health of Southampton*, 30 Law Tim. Rep. 151.

WRIT OF ERROR [vol. 1, pp. 128, 159, 271;

vol. 2, pp. 8, 56].—*Frivolous grounds—Execution—Common Law Procedure Act, 1852* (15 & 16 Vic. c. 76), s. 150.—The 150th section of the Common Law Procedure Act, 1852 (15 & 16 Vic. c. 76), provides that "if the grounds of error shall appear to be frivolous, the court or a judge upon summons may order execution to issue." The court refused to allow execution to issue, notwithstanding proceedings in error, under the above 150th section of the Common Law Procedure Act, 1852, it being stated that the writ of error was brought *bond fide*, under the advice of counsel, and not for the purpose of delay, and it not appearing that the grounds of error were so frivolous as not to admit of argument. *Hall v. Conder*, 26 Law Journ. C. P. 251.

BANKRUPTCY.

BAIL.—*Discharge of insolvent on sureties—Opposition by attorney of creditor—Action for assault and false imprisonment—Damages recovered.*—Where damages have been recovered against an insolvent for assault and false imprisonment, the court will exercise a discretion as to enlarging him on bail till his hearing. *Re Barton*, 29 Law Tim. Rep. 399.

DISCHARGE OF INSOLVENT BY DETAINING CREDITOR.—*Before the day of hearing* [vol. 2, pp. 202, 226].—*Illness of commissioner—Adjournment of court.*—Where a discharge is lodged at the prison by an insolvent's detaining creditor the evening before the day named for his hearing, but he comes up in custody with other prisoners, not having gone out of custody: Held, that the court will pronounce an adjudication: Held, also, that when, under these circumstances, an adjudication has not been obtained by an insolvent in consequence of the illness of the commissioner, and the adjournment of the court to a subsequent day, that the court on that day will act as it would have done upon the day originally fixed for the hearing, and the insolvent will be discharged. *Re Pinner*, 30 Law Tim. Rep. 159.

EQUITABLE MORTGAGE.—*Memorandum of deposit—Bills of exchange—Judgment—Usury—No interest mentioned in memorandum.*—H. gave a warrant of attorney to confess a judgment for £2,000 to L., to secure the payment of four bills of exchange drawn the same day by him upon and accepted by H., and judgment was entered up and registered the next day. The bills were renewed, and the renewals were deposited by L. with a creditor of his own to secure a debt of £1,200, with a memorandum stating that the bills were secured by a judgment, but not making any mention of interest or the rate of interest. It was proved that interest was paid to the creditor by L. for ten years at the rate of £12 10s. per cent. per annum. L. subsequently became

bankrupt, and the creditor having died, his executors presented their petition, praying to be declared entitled to an equitable lien on certain moneys then in the hands of the official assignee of L., such moneys being part of the produce of the sale of real estate belonging to H., on which L. was declared to have a lien by virtue of the judgment given to him by H.: Held, confirming the decision of one of the commissioners, that, as no interest was mentioned in the memorandum, it was to be taken to refer to the principal money alone, and that the memorandum created a new contract. The executors of the creditor were, therefore, declared to be entitled to a lien for the principal of the debt, but not for the interest. *Ex parte Hodge*, 26 Law Journ. Bank. 77.

EXCEPTED ARTICLES [vol. 1, p. 153].—£20 allowed to bankrupt, when—17 & 18 Vic. c. 119.—The bankrupt will not be allowed to receive £20 in money, in lieu of excepted articles, where all his goods and effects have been taken and sold under a distress for rent, and no part of the proceeds has come to the hands of the assignees. *Re Dockree*, 30 Law Tim. Rep. 160.

JURISDICTION OF INSOLVENT COURT.—*Custody of insolvent upon a capias in an action for damages, where no damages have been assessed by a jury.*—By the 1 & 2 Vic. c. 110, s. 85, it is enacted, "that from and after the time appointed for the commencement of this act, it shall be lawful for any person who shall be in actual custody within the walls of any prison in that part of the United Kingdom called England, upon any process whatsoever, for or by reason of any debt, damages, costs, sum or sums of money, or of costs taxed or untaxed, either ordered to be paid or to the payment of which such person would be liable in purging such contempt, or in any manner in consequence or by reason of such contempt, at any time within the space of fourteen days, &c., to apply by petition in a summary way to the court for relief of Insolvent Debtors for his discharge from such custody," &c. Where an insolvent is in custody upon a writ of capias sued out in an action for damages upon breach of contract, but no damages assessed by a jury: Held, that this is process within the meaning of the words of the above 85th sec. of the 1 & 2 Vic. c. 110. *Re Christmas*, 30 Law Tim. Rep. 159.

OPPOSITION [vol. 3, pp. 228, 308, 382, 381].—*Creditor seeking a partial payment—Collusive arrest.*—Where a creditor seeks to obtain a partial payment for himself, his opposition will be shut out; but the rule will not apply if there is anything done by the insolvent to induce the creditor to make the demand so as to use it afterwards as a defence to opposition. Shutting out a creditor on this ground will not

prevent the court inquiring if the arrest was collusive. *Re John Allen*, 29 Law Tim. Rep. 399.

PETITIONER FOR PROTECTION.—*Debts above £300*—*Debts barred by the Statute of Limitations.*—Held, that upon the petition of a trader debtor, debts barred by the Statute of Limitations must be inserted in the schedule, and that if, together with the other debts inserted in the schedule, they amount to above £300, the petition must be dismissed. *Re Warwick*, 30 Law Tim. Rep. 159.

PUBLIC COMPANY [vol. 3, pp. 175—177, 187, 254, 339].—*Contributories* [vol. 3, pp. 125, 151, 218].—*Settling list of*—*Jurisdiction of commissioner in bankruptcy to settle*—*Cost-book* [vol. 3, pp. 21, 41].—*Relinquishment of shares*—*Married woman*—*Liability of shareholders to creditors*—*Shares fully paid up*—*Calls*—*Transfer.*—The Court of Bankruptcy is authorised by the Joint-Stock Companies Act, 1856 (19 & 20 Vict. c. 47, s. 82), to make calls upon the contributories to the extent of their liability for payment of the debts of the company in process of being wound up. By sect. 108, the Winding-up Acts of 1848 (11 Vic. c. 45) and 1849 (12 & 13 Vic. c. 108) are not to apply to companies registered under the act, 1856, from and after the date of their being registered under the act of 1856. The court will, under the circumstances, assume that it has jurisdiction to settle the list of contributories, notwithstanding that no provision is made by the act for this purpose, and no power exists in the Court of Bankruptcy in the exercise of its general practice to settle such list. By sect. 61 of the act of 1856, in the event of any company being wound up by the court, if the company be limited, no contribution shall be required from any shareholder exceeding the amount (if any) unpaid on the shares held by him. By rule 11 of the cost-book of a company, formed upon the cost-book principle, "no shareholder shall be liable for any debt, damages, claims, and demands of, upon, or against the company, to any greater extent than in proportion to the number of shares for the time being held by him in the capital of the company." An original shareholder in a cost-book company, which was of unlimited liability from its commencement down to June, 1857, when it was registered as a "limited" company under the Joint-Stock Companies Act, 1856, who has paid the whole amount payable upon his shares, is a contributory in respect of the debts of the company incurred prior to the time of registration as "limited." A shareholder in a cost-book company, who has given notice to the purser of his desire to relinquish his shares to, and to retire from, the company, without paying the calls due upon his shares at the time of such notice, in consequence of which and of his refusal to pay his proportion of the company's

debts, the purser refused to accept such relinquishment of his shares, is a contributory of the company for payment of debts, notwithstanding he has since paid all the calls due from him to the company. A married woman took shares in a company, and her name was accordingly entered as a shareholder in the cost-book. Her husband subsequently signed a notice to the purser of his approval of his wife's desire to relinquish her shares and withdraw from the company in accordance with a notice from her to that effect. The purser refused to accept the notice unless the calls due upon her shares were paid, as also a proportionate part of the company's debts. The husband subsequently paid the calls: Held, he was contributory in respect of these shares. By sect. 62 of the Joint-Stock Companies Act, 1856, a shareholder in a company, other than a limited company, who has ceased to be a shareholder for three years, and by sect. 63, a shareholder in a limited company who has respectively ceased to be a shareholder for one year prior to the commencement of the winding up of the company, shall be deemed, for the purposes of contribution towards payment of the company's debts, &c., to be an existing shareholder, and be subject to the same liabilities to creditors as if he had not so ceased to be a shareholder. Where a shareholder had, within a year of the company being wound up, transferred his shares, and the transfer had been accepted by the transferee, and his name duly registered in the cost-book of the company: Held, that he continued liable to the debts of the company incurred before the transfer, and that the circumstance that the company had, since the transfer, been registered under the Joint-Stock Companies Act, 1856, as a limited company, it having been previously other than a limited company, made no difference except as to whether sect. 62 or 63 is to apply: Held, also, that the omission to enter the name of the transferor, as well as of the transferee, upon the list delivered to the registrar of joint-stock companies under sect. 111, will not, upon the construction of that and the 113th sections, affect the liability of the transferor. *Exp. The Official Liquidator, Re the Welsh Potosi Lead and Copper Mining Company (Limited)*, 29 Law Tim. Rep. 400.

TRADER-DEBTOR SUMMONS.—*Summoning creditor must show the trading.*—A party brought to the court under a trader-debtor summons is entitled to call upon the party summoning him to show the trading. *Re Trader-Debtor Summons*, 30 Law Tim. Rep. 159.

VEXATIOUS LITIGATION [vol. 2, p. 226].—*Making away with property* [vol. 3, p. 381].—*Concealment of property*—*Breach of trust*—*Parties returned as debtors claiming to be creditors.*—Where an

insolvent makes a claim which turns out unfounded, and having put the defendants to great expenses in defending it, he being their debtor, he will be guilty of vexatious litigation. Where there is clear evidence of making away with property, but the evidence of concealment is not satisfactory, the insolvent will be remanded instead of dismissing the petition. A sequestrator is in the character of a trustee, and applying money received as such to his own use is a breach of trust. Where parties are returned as debtors, who claim to be creditors, they will be placed on the schedule upon proving their debts by their own oath. *Re Barnes*, 29 Law Tim. Rep. 400.

VEXATIOUS LITIGATION [vol. 2, p. 226].—*Defence failing for want of means to carry it on.*—Where an attorney advises his client that he has a good defence to an action, and a defence is accordingly filed, but it is allowed to fall to the ground because the client has not money to advance to carry it on, he will not be remanded for vexatious litigation. *Re Pender*, 29 Law Tim. Rep. 400.

COUNTY COURTS.

CERTIORARI.—*Costs—Practice—Rule absolute.*—A rule for a certiorari to remove a cause from a county court under the 9 & 10 Vic. c. 95, is absolute in the first instance. Where the court think a case fit to be removed from a county court by certiorari, they will not annex a condition to granting it, that the party applying shall, if successful, recover no more costs than he would have recovered in the county court—at least, if the cause be one in which the superior court and county court have a concurrent jurisdiction. *Dowding v. The Great Western Railway Company*, 3 Jur. N. S. 1130.

COSTS [vol. 3, pp. 55, 326].—*Concurrent jurisdiction* [vol. 1, pp. 327, 385].—*Metropolitan districts*.—Sec. 18 of 19 & 20 Vic. c. 108 [stated vol. 3, p. 72].—By sec. 18 of 19 & 20 Vic. c. 108, a plaintiff, who resides or carries on business in any of the metropolitan county court districts, is enabled to sue his debtors who reside or carry on business in any of the said districts, either in the district where he himself dwells or carries on his business, or in that where the debtor dwells or carries on his business (vol. 3, p. 72). The Court of Queen's Bench has held that this does not affect the 128th section of 9 & 10 Vic. c. 95, giving concurrent jurisdiction to the superior courts where the plaintiff resides more than twenty miles from the defendant. *Waterlow v. Dobson*, 30 Law Tim. Rep. 150.

JOINT CLERKS.—*Death of one not cessation of office to other*.—9 & 10 Vic. c. 95.—Section 25 of the County Court Act, 9 & 10 Vic. c. 95, empowers the Lord Chancellor in populous districts to direct

that two persons shall be appointed "to execute jointly the office of a clerk, under such regulations as to the division of the duties and emoluments of the said office as shall be from time to time made by order of court in case of difference between them." The 24th section provides generally for the appointment of a clerk of each county court by the judge of the court, subject to the approval of the Lord Chancellor. The death of one of two joint clerks of a county court, appointed under the above 25th sec. of the 9 & 10 Vic. c. 95, does not operate as a cessation to the office of the other, but only as a suspension until another joint clerk is appointed. *Reg. v. Wake*, 30 Law Tim. Rep. 116; 6 Week. Rep. 36.

JURISDICTION IN INSOLVENCY.—*Creditor's petition—Reference by Insolvent Court to County Court.*—By 10 & 11 Vic. c. 102, s. 10, it is enacted that the circuits of the insolvency commissioners shall be abolished after the 15th September, 1847, and that if thereafter any insolvent debtor shall make application to the court for relief, or if any insolvent debtor shall have so applied, such court shall forthwith, after the schedule of such petitioner shall have been filed in the case of a new petition, or at any time which shall be thought fit in the case of a petition theretofore presented, make an order referring such application to the judge of the county court. These words, taken literally, apply to a petition presented by an insolvent, and do not expressly apply to a petition presented by a creditor against an insolvent; but considering the purpose of the act and the context, together with 1 & 2 Vic. c. 110, the intention of the Legislature to give jurisdiction in respect of creditors' petitions as well as insolvents' petitions sufficiently appears. This construction is fortified by referring to 1 & 2 Vic. c. 110, s. 36, creating the power of creditors to petition for vesting orders. If a vesting order is made thereon against an insolvent, the enactment is that a further order shall then be made for the insolvent to file a schedule thereon, and then he is to be brought up for hearing, and all things are to be done thereupon or preparatory thereto, as in other cases according to this act—that is, as in cases of petitions by insolvents. The act provides for hearing the insolvent after a schedule has been filed on his own petition; it then provides for a creditor's petition; and if the insolvent files a schedule thereon, the procedure for a hearing thereon is to be the same as in the case of an insolvent's petition. In the following case the doubt which has hitherto existed is put an end to, it being decided by the Court of Queen's Bench, that under the 10 & 11 Vic. c. 102, s. 10, the Insolvent Court in London has authority to make an order of reference to a county court in the matter of an insolvent

where the proceedings in insolvency have originated in a creditor's petition as well as where they have originated in a petition by the insolvent. *Exp. Greenwood*, 6 Week. Rep. 102.

JURISDICTION.—*Districts in Metropolis* [vol. 3, p. 72].—*County Courts Amendment Act*, 19 & 20 Vic. c. 108, s. 18.—A person is entitled to sue in the county court within the district of which he has taken lodgings the previous day only, and has continued to reside in such lodgings down to the trial. The 19 & 20 Vic. c. 108, s. 18, provides that, where a plaintiff shall dwell, &c., in the district of the County Court of Middlesex, or in, &c. (the district of the other metropolitan courts), and the defendant shall dwell or carry on business in the district of any of the said courts, the summons may issue and be served either in the district in which the plaintiff shall dwell or carry on business, or in the district in which the defendant shall dwell or carry on business (vol. 3, p. 72). The plaintiff and the defendant lived within the Marylebone County Court district, where the cause of action arose. A summons being issued by plaintiff against defendant from the Bloomsbury County Court district, it was dismissed by the judge. On the following day plaintiff took lodgings within the Bloomsbury County Court district, and caused a second summons to be issued from that court against defendant the next day. Plaintiff resided there continuously, and nowhere else. The county court judge decided, upon objection being taken that he had no jurisdiction, as the plaintiff did not reside in the district, the taking of the lodging it being contended being merely colourable, that such residence was sufficient, and he heard the case: Held, by the Court of Exchequer, that he was right, and that he had jurisdiction. *Massey v. Burton*, 30 Law Tim. Rep. 156, 6 Week. Rep. 108.

LEGACY.—*Proceedings to recover—Injunction—Mortgage, legacy.*—The jurisdiction of the county courts extends to the recovery of the amount or part of the amount, not exceeding £50, of a distributive share under an intestacy, or of any legacy under a will (9 & 10 Vic. c. 95, s. 65; 13 & 14 Vic. c. 61, s. 1). Legatees, who have mortgaged their interest in a legacy, will be restrained from prosecuting a suit in the county court to obtain payment of the same from the executors. *Neighbour v. Brown*, 26 Law Journ. Ch. 670.

CRIMINAL LAW.

ARREST [vol. 3, p. 394].—*Assault—Policeman in discharge of his duty—Evidence.*—Pollock, C. B., in *Reg. v. Walker* (1 Dear. C. C. 358; 2 Week. Rep. 416), said, "that where an assault is witnessed by a policeman, and there is a continuing pursuit, the policeman is justified in taking a prisoner into

custody." Accordingly it was held, in the following case, that where a policeman saw a man who was drunk assault his wife, and within twenty minutes after took him into custody, that the policeman was justified in so doing, notwithstanding the man had left the spot where his wife was, saying "he should leave her altogether." *Reg. v. Light*, 30 Law Tim. Rep. 137; 6 Week. Rep. 42.

CRIMINAL APPEAL COURT [vol. 1, p. 308].—*Costs in court of criminal appeal—Taxing officer—New rule.*—There is no taxing officer of this court; therefore, where the judge at the trial allowed costs in the usual way, which this court thought sufficient to include costs subsequently incurred here, the court said that the officer of this court would ascertain the costs incurred here, and certify the same to the taxing officer of the court below, and that the court would make a rule upon the subject. *Regina v. Cutting*, 6 Week. Rep. 41.

FORGERY.—*Cheat at common law—False token or mark—Passing off a copy as an original picture by painting artist's name in the corner.*—Forgery must be of some document or writing; therefore, the painting an artist's name in the corner of a picture with the intent to pass it off as the original production of that artist, is not a forgery. If a person in the way of his trade or business put, or suffer to be put, a false mark or token upon any article so as to pass off as genuine that which is spurious, if such article be sold by means of such false token or mark, the person so selling may be indicted for a cheat at common law, but the indictment must allege that the article was passed off by means of such false token or mark. Where an indictment alleged that the prisoner, being a picture dealer, knowingly kept in his shop a picture whereon the name of an artist was falsely and fraudulently painted, with intent to pass the picture off as the original work of the artist whose name was so painted, and that he sold the same to H. F. with intent to defraud, and did thereby defraud him, but without stating that the picture was passed off by means of the artist's name being so falsely painted: Held, that such painting of the artist's name, was putting a false token on the picture, and that the selling by means thereof would be a cheat at common law, but that the want of such last averment was fatal. *Reg. v. Closs*, 6 Week. Rep. 109.

HABEAS CORPUS.—*Admissibility of affidavits*—[First Book, 45].—Where a warrant of commitment, setting out a conviction, is good on the face of it, it is doubtful whether, on the return to a writ of *habeas corpus*, affidavits are admissible raising objections not appearing upon the warrant; as, for instance, disclosing a former conviction for the same offence. *Ex parte Baker*, 26 Law Journ. Ex. 334.

HIGHWAYS [vol. 8, p. 22].—*Appeal against a certificate for stopping up a highway* [vol. 1, p. 17].—*Notice of appeal—Entering and adjourning.*—Sec. 88 of the 5 & 6 Will. 4, c. 50, enacts, with reference to appeals against a certificate under s. 85, for stopping up a highway, that any person who may think that he would be injured or aggrieved if any such highway should be stopped up, may make his complaint by appeal to the justices at quarter sessions "upon giving to the surveyor ten days' notice in writing of such appeal, together with a statement in writing of the grounds of such appeal. Provided, also, that it shall not be lawful for the appellant to be heard in support of such appeal, unless such notice and statement shall have been so given as aforesaid," &c. Upon an appeal against the stopping of a highway coming on for trial at the quarter sessions, it was objected that the notice of appeal was insufficient, as not having been given ten days before the sessions, as required by s. 88 of the 5 & 6 Will. 4, c. 50. Upon this the appellants applied to the sessions to enter and adjourn the appeal to the next sessions, which the sessions accordingly did. Upon a rule for a certiorari to remove the order of sessions that the same might be quashed: Held, that, as legal notice of appeal had not been given, the sessions had no jurisdiction to deal with the appeal, and were therefore wrong in adjourning it. *Reg. v. The Justices of Lancashire*, 30 Law Tim. Rep. 149.

JUDGE INTERESTED.—*Quarter sessions.—Tithe rent-charge—Presence of an interested magistrate—Invalidity of proceedings.*—The following Irish case shows how jealously the law guards against the interference of a magistrate in a case in which he has any personal interest. A magistrate was present on the bench at the hearing of an application for the reduction of the tithe rent-charge, he being himself one of the tithe payers interested in the case: Held, that the court was improperly constituted, and a certiorari will issue to bring up the proceedings. *Reg. v. The Justices of Cork*, 30 Law Tim. Rep. 25.

LARCENY [vol. 2, p. 216].—*Intention to deprive the owner of his property—Fraudulent removal of articles in order to obtain payment as for work done upon them.*—In order to constitute larceny, the taking must be with intention to vest the property in the thief—i.e., by wrong (*Reg. v. Holloway*, 18 Law Journ. M. C. 60); and, therefore, where servants employed by a glove-maker in finishing gloves removed a quantity of finished gloves from one part of the master's premises to another, with intent fraudulently to obtain payment for them, as for so many gloves finished by them: Held, that they were not guilty of larceny. *Reg. v. Poole*, 30 Law Tim. Rep. 158.

LARCENY.—*Property of intestate—Evidence of*

death before the taking—Election to proceed in respect of particular articles.—Upon an indictment for stealing numerous articles laid as the property of the ordinary, the evidence was that the articles belonged to a deceased person; that a search had been made for a will, but none found; that some small portion of the articles had been seen in the house of the deceased after her death, before her funeral; and that on the day of the funeral the prisoner took a large portion of them to the house of a witness: Held, that there was abundant evidence that some of the articles had been stolen after the death, and that consequently the property was rightly laid in the ordinary; and that the court of quarter sessions had done quite right in refusing to put the prosecutor to an election to proceed in respect of the taking of any particular articles, as there was some evidence that all were taken after the death. *Reg. v. Johnson*, 30 Law Tim. Rep. 158.

LICENCE.—*Billiards—8 & 9 Vic. c. 109, s. 11.*—By the 9 Geo. 4, c. 61, an appeal lies against the grant or refusal of a licence for keeping an inn, ale-house, and victualling-house. By the 8 & 9 Vic. c. 109, s. 11, justices are enabled, at their meetings, under the 9 Geo. 4, c. 109, to grant licences to parties to keep billiard-tables, but no appeal is given. It has been decided that there is no appeal against the refusal of justices to grant a licence to a party to keep a house for public billiard playing. *Reg. v. The Justices of Devon*, 30 Law Tim. Rep. 150.

POOR RATE.—*Exemption from, of residence of public officer under Crown* [vol. 1, p. 847].—*Excess beyond what is reasonably necessary rateable.*—A public officer occupying premises under the Crown for the discharge of his duties, is not rateable for what is reasonably necessary for his accommodation, considering his rank and position; but for anything in excess of this he is rateable. *Reg. v. Stuart*, 6 Week. Rep. 35.

RECEIVER OF STOLEN GOODS [vol. 8, p. 38].—*Special verdict—Receiving with guilty knowledge—"Adopting" another's receipt.*—Where, in a joint indictment against a husband and wife for receiving goods with a guilty knowledge, the verdict found specially that the wife did so receive, and that the husband "adopted his wife's receipt:" Held, that these latter words were not equivalent to a verdict of guilty against the husband. *Reg. v. Dring*, 6 Week. Rep. 41.

SESSIONS.—*Enforcing order by attachment—12 & 13 Vic. c. 45, s. 18—Non-application of sec. 18 to an order upon an indictment for a nuisance* [vol. 2, p. 217].—By sec. 18 of the 12 & 13 Vic. c. 45 (the General and Quarter Sessions Courts Procedure Act), it is enacted "that in all cases where any order shall be made by any court of general or quarter

sessions of the peace, it shall be lawful for the Court of Queen's Bench, or for any judge of that court at chambers, either in term or vacation, upon the application of any person entitled to enforce such order, and upon the production of a copy of such order under the hand of the clerk of the peace, or his deputy, and upon proof of refusal or neglect to obey such order, to order and direct such order of the court of general or quarter sessions to be removed into the said Court of Queen's Bench, and thereupon such order shall be of the same force and effect, and may be enforced in the same manner as a rule made by the said Court of Queen's Bench," &c. A. B. was indicted for a nuisance, and by the judgment of the court he was ordered to abate it. Not having obeyed the order, it was made a rule of the Court of Queen's Bench under the above 18th sec. of the 12 & 13 Vic. c. 45, and an application was afterwards made under the same section for a rule for an attachment for disobeying such rule: Held, that the section does not apply to a judgment or order upon an indictment, which can be enforced in the ordinary way. *Seem*, that upon such an indictment the proper course is to apply for a writ of prostration. *Reg. v. Bateman*, 30 Law Tim. Rep. 157, 150.

NOTICES OF NEW BOOKS.

ARCHBOLD'S JOINT-STOCK COMPANIES ACTS.

The Law of Partnership and of Joint-Stock Companies, with or without Limited Liability, under the Recent Acts, to which are added the Proceedings on the New Statute relating to Bills of Exchange and Promissory Notes. Third edition. By JOHN FREDERICK ARCHBOLD, Esq., Barrister-at-Law. Shaw and Sons, Fetter-lane. Cloth, 6s.

This is another of the many useful books, with which Mr. Archbold has favoured the profession. Whatever may be the opinions of the profession on the justice or expediency of limited liability, and the credit or discredit to be given to companies formed with that attribute, it may be said, as has been said by men great at this time of the year, "Here we are;" and whether you like or dislike these companies, you must know something of the law relating to them, or clients who intend to burn their fingers with them, or have already so done, will go elsewhere for remedies. Besides, the acts include companies *without* limited liability, and so take in all the great partnerships, except banking and insurance.

The acts treated of in this little pocket volume, are the Joint-Stock Companies Acts of 1856 and 1857, which are set out verbatim, preceded by a short treatise upon them in four sections—Section 1 treating of the formation of the company, comprising

the memorandum and articles of association; the registration of the company and its shares; and their holders' certificates, transfer, and calls. Section 2 relates to the proceedings of the company, including its office, name, and meetings, deeds, securities, summons, notices, increase of capital, directors, dividends, and the examination of the company's affairs. Section 3 brings us to the winding-up of the company, either by the court, or by a voluntary process of evaporation; and section 4 relates to the registration of existing companies—that is, those who were formed under the former acts.

This treatise or summary of these acts is very well done, and gives a good general view of what the acts have effected in reference to joint-stock companies. Moreover, it is readable, and, we fully believe, may be relied on. At nearly every step there is a reference to the page where the section *in extenso* will be found, so that the correctness of the remark upon it may be tested forthwith. It is likewise an excellent preparatory step to the understanding of the act for those who have to thoroughly read it. Several of the sections of the act of 1856 were repealed by the amending act of 1857. These repealed sections Mr. Archbold has omitted from his print of the act. We should have preferred their remaining, or, at least, given in a note. Also, that he should have stated why he left them out, as that is not discovered till the subsequent act is read. We may remind our readers that there was a "further amending act" passed in 1857 (after Mr. Archbold's book was published), 20 & 21 Vic. c. 80, but it only relates to insurance companies, and preserves as to them the otherwise repealed statute of 8 Vic. c. 110.

The remainder of this little book consists of the Law of Partnership, which Mr. Archbold considers was necessary to be shortly treated of, in order to render the Joint-Stock Act, and the mode of establishing a company under it, intelligible. He accordingly gives a succinct, readable sketch of the Law of Partnership, in four chapters: treating—Chap. I. Of the formation of the partnership; Chap. II. How far the acts of one partner are binding on all; Chap. III. On actions and suits by and against partners; and Chap. IV. On the dissolution. The learned author says, at p. 11, that a payment by one of several partners will have the effect of taking a case out of the Statute of Limitations, not only as against him, but as against his partners also. We think Mr. Archbold forgot to notice here the 14th section of "The Mercantile Law Amendment Act," which enacts that no co-contractor or co-debtor shall lose the benefit of the statute, by reason only of any payment by his co-contractor or co-debtor. This, of course, would apply to partners; but to remove any

doubt, the case of *Thompson v. Waithman* (2 Jur. 1080) may be referred to, where the benefit of the late statute was extended to partners, and in a case where the statute had passed after the cause of action had accrued.

As to the dissolution of a partnership, Mr. Archbold says, p. 20, that if there be two partners only, the death of one dissolves the partnership altogether. "*If three, the partnership still exists, and is continued by the two on the terms mentioned in the articles or deed of partnership.*" This seems good common sense; but we doubt that it is common law. Although Lord Chancellor Cowper thought it was, or "so inclined," yet Lord Eldon, on several occasions, distinctly laid it down that the "destruction" of one operated as a dissolution with respect to the whole (see *Crawshay v. Collins*, 15 Ves. 228; *Kinder v. Taylor*, Gow, 240; *Re Williams*, 10 Ves. 5.)

Mr. Archbold then adds a short chapter upon the proceedings on bills of exchange and promissory notes, and appends the forms of writ, &c., with the sections of the statute relating to the above matters; and these will be found very useful. On the whole, we think the profession gets a useful book on a useful subject at a reasonable rate; and we may add that the details of the book are quite a specimen of the mode in which a book should be "rightly divided."

Archbold's Joint-Stock Companies Acts, 1856 and 1857; with Introduction, stating the Mode of forming a Company, its Proceedings, and the Mode of winding it up. By JOHN FREDERICK ARCHBOLD, Esq., Barrister-at-Law. Shaw and Sons. Price 3s.

Mr. Archbold has usefully treated these acts by incorporating the amending act into the principal act, so that they read together, and are yet distinguishable by means of different type. The advantage of this on any hasty reference to either act is very great. The introduction forms a readable summary of the proceedings under the acts—viz., the formation of the company, its proceedings and winding-up; which, with an Index, furnishes the reader with a ready means of getting at any part of the act, and the pith, substance, and body of the sections he requires.

GLEN'S BURIAL BOARD.

The Burial Board Acts of England and Wales, 15 & 16 Vic. c. 85; 16 & 17 Vic. c. 134; 17 & 18 Vic. c. 87; 18 & 19 Vic. c. 128; 20 & 21 Vic. cc. 35, 81: with Introduction, Notes, Cases, and Index. By WILLIAM CUNNINGHAM GLEN, Barrister-at-Law, and of the Poor Law Board. London: Shaw and Sons.

Whatever may be the figurative meaning of the

Divine injunction, "Let the dead bury their dead," there would seem to be some reason to suppose that our ancestors were inclined to act on it in a literal sense, and hence the little legal provision made for the decent disposal of the dead, though no doubt the non-burial of a body by the proper persons was punishable by the law in an indirect manner—as a common nuisance. But in these so-called enlightened days, we have invoked the assistance (it might seem too satirical, even at this merry season of the year, to say the wisdom) of Parliament to regulate burials, not only of the poor, but of all classes of society; and we have now the satisfaction of knowing that we can be buried according to act of Parliament, or in some cases, if we desire it, through the intervention of a joint-stock company. There can be no doubt that this is an improvement in some respects; and, indeed, whether so or not, we must submit to it with the best grace we can. As usual there are several statutes regulating burials, and doubtless there will yet be more. Not troubling ourselves at present with the future statutes, we will indicate what are those now in force: and these we find to be the 15 & 16 Vic. c. 85; 16 & 17 Vic. c. 134; 17 & 18 Vic. c. 87; 18 & 19 Vic. c. 128; 20 & 21 Vic. cc. 35, 81: thus, with the exception of the 19 & 20 Vic., every session of Parliament since the first act has produced an addition, and the 20 & 21 Vic. has made up for the neglect of the previous session, by bringing forth twins. It must be obvious from this statement that there is, from the well-known tendency of acts of Parliament to go counter to each other, ample scope for any experienced person to make a book for the guidance of those concerned in the administration of the burial laws. And, accordingly, Mr. Glen has volunteered a production which his official position may be truly said to have afforded him ample opportunity for preparing. His object has been to furnish burial boards and their officers with a practical guide in the right execution of their duties; boards of guardians with an exposition of the law relating to the burial of poor persons at the cost of the poor rates in new burial grounds provided under the Burial Board Acts; and the public with lucid information as to the nature of the new law in regard to burial grounds and burials. The introduction treats of the law with respect to burials generally, and particularly of the new Burial Acts. These acts are then given in *extenso*, with practical notes and references; together with the whole of the decisions of the courts upon those acts up to the present time. The appendix contains the regulations and instructions issued by the Secretary of State for the Home Department under the 15 & 16 Vic. c. 85, 16 & 17 Vic. c. 134, 17 & 18 Vic. c. 87, and 18 & 19 Vic. c. 128. The

introduction will be found extremely useful, as presenting in a compendious form the former and existing laws as to the burial of the dead; and it may be added that the acts themselves are given in *extenso*, accompanied with many useful notes. Mr. Glen observes, in that part of the introduction devoted to the new law introduced by the Burial Acts, that "the first of those acts, the 15 & 16 Vic. c. 85, which was passed in 1852, was originally confined to the metropolis; but in the following year, with the exception of certain clauses, it was extended to all districts beyond the metropolis. Further provision was made for the burial of the dead in borough towns by the 17 & 18 Vic. c. 87; and the laws concerning the burial of the dead were again further amended by the 18 & 19 Vic. c. 128, and the 20 & 21 Vic. cc. 85 and 81. The subject of the following pages, therefore, naturally resolves itself into the burial of the dead in the metropolis; in borough towns; in places under local boards of health; and in other places. Each will be considered in the order of sequence, and then the provisions of the several acts which are of general application." The author does not, however, confine himself, in his introduction, to the new law, but discourses respecting burials in churches and churchyards; and as these burials are not, except in certain cases, abrogated, it may be useful as well as interesting to know the law respecting them.

Institution of churchyards—Burial under the Roman law—Burial in England.—Cemeteries or burial grounds apart from churches are not a new institution. When churches were first erected in England, no part of the ground surrounding them was originally reserved for the purposes of sepulture; but a place at a distance was appointed in which to bury the dead. This was in accordance with the Roman law, which required that the dead should be buried without the walls of cities. At first they were buried by the wayside; but afterwards some inclosure was assigned for the purpose. About the beginning of the seventh century, the Augustine Monastery at Canterbury was built without the walls, in order (as Ethelbert and St. Augustine intimate in their charters) that it might be a dormitory (*i. e.*, place where their bodies may sleep until the resurrection) to them and their successors, the Kings and Archbishops for ever. The practice of burying at a place remote from the church appears to have continued in England until about the year 750, when Cuthbert, Archbishop of Canterbury, introduced from Rome the custom of having churchyards attached to churches for the greater convenience of the priesthood in offering prayers for the dead. Churchyards were carefully inclosed and consecrated, and appropriated for the burial of those who had been entitled

to attend Divine service in those churches, and who now became entitled to render back into those places their remains to earth, the common mother of mankind, without payment for the ground which they were to occupy, or for the pious offices which solemnised the act of interment (Lord Stowell in *Gilbert v. Buzzard*, 2 Cons. Rep. 343; 3 Phill. Rep. 348). Previous to that time, however, a practice had obtained of burying within churches, either in the nave or body of the church, or under arches by the walls, and sometimes in vaults in the chancels, or under the altar itself. Such a practice, however, was not allowed, and never could be claimed as a right by the parishioners generally, and was restrained by authority, except in cases of persons who were in the priesthood, or who were eminent for their piety, and considered deserving of burial within the body of the church. The custom of burying in churches was never much countenanced after the Reformation, for it was not only injurious to the fabric of the church, but was prejudicial to the health of the parishioners when they were assembled in the church. Lord Stowell, in *Gilbert v. Buzzard*, said: "The practice of sepulture has varied with respect to the place where performed. In ancient times caves seem to have been in high request; then gardens or other private demesnes of proprietors; inclosed spaces out of the walls of towns, or by the sides of roads (*siste viator*); and, finally, in Christian countries, churches and churchyards, where the deceased could receive the pious and charitable wishes of the faithful, who resorted thither on the various calls of public worship." And again he says: "The rule of law which says that every man has a right to be buried in his own churchyard, is to be found most certainly in many of our authoritative text-writers."

Right to burial without payment.—Though, however, every person may as of right be buried in the churchyard of the parish wherein he dies, without any payment being made for breaking the soil, a fee may be due to the minister, clerk, or sexton, by prescription or immemorial custom (*Sir Simon Degge's Parsons Law*, part 1, c. 12). The clergyman is bound by law to bury the corpses of parishioners in the churchyard, but he is not bound to bury in any particular part of the churchyard, as he and the churchwardens may exercise a discretion in that respect. Consequently, if the clergyman is asked to do that which the law does not compel him to do, he may refuse, except upon certain conditions being complied with. Hence the court will not grant a mandamus to compel a rector to bury the corpse of a parishioner in a vault or in any particular part of the churchyard (*Ex parte Blackmore*, 1 B. and Ad. 122). A mandamus lies to compel a clergyman to bury the corpse of a parishioner; but

if he has not refused to bury at all, but only to bury in a particular mode, or in a particular part of the churchyard, no mandamus will lie (Reg. v. St. Aubyn, 2 L. J. R., K. B. 384; S. C., 1 B. and Ad. 122).

Burial of non-parishioners.—Strangers, or persons who have died out of the parish, may not, as of right, be buried in the churchyard of another parish than that wherein they died, for there can be no absolute claim of that kind (per Lord Stowell in *Bordin v. Calcott*, 1 Cons. Rep. 17); but a stranger may be so buried with the consent of the churchwardens, if the burial do not cause actual inconvenience to the parishioners by pre-occupying more of the ground than they themselves require (*Littlewood v. Williams*, 6 Taunton, 277).

The canon—Burial service—Burial fees by the custom.—By the 68th canon, no minister shall refuse or delay to bury any corpse that is brought to the church or churchyard, convenient warning being given him thereof before, in such manner and form as is prescribed in the Book of Common Prayer, except the person deceased “were denounced excommunicated *majori excommunicatione* for some grievous and notorious crime, and no man able to testify of his repentance.” The minister is also bound to read the burial service in the manner and form prescribed by the Book of Common Prayer, over the corpse of any person who was baptised with water and in the name of the Holy Trinity, if required so to do, though the deceased was never baptised otherwise than by a layman; for such a person cannot be said to die unbaptised within the meaning of the rubric for the burial of the dead, as incorporated into the 13 & 14 Car. 2, c. 4 (*Escott v. Martin*, 6 Jur. 765). It is also the duty of a minister of the Established Church to bury the child of a person who is a dissenter from the church (*Kemp v. Hicks*, 3 Phill. 264). He cannot, therefore, either by the canon or by the common law, demand anything for the burial; but, as a fee may be due by prescription or immemorial usage (*Cawthorne v. Andrews*, Willes, 586), the laity are compellable to observe the custom; and though the minister may not refuse to bury because the custom is not observed, he may afterwards recover, according to the custom of the particular parish. Properly this is a matter of spiritual cognisance; but nevertheless the common law courts reserve to themselves the right of determining the custom if it be denied; and, if it be not denied, whether it is a reasonable custom.”

Mr. Glen proceeds to state the amount of the fees, and to whom they belong, and then notices the kindred subject of fees for the erection of monuments, with the manner of burial, discussing the question as the kind of coffin—whether iron or wood—in which

a man may be buried. In a note to the schedule of fees appended to the 20 & 21 Vic. c. 35, Mr. Glen raises a point as to the meaning of the term “pauper” which will, we think, rather surprise our readers. He says, “‘For each burial of a pauper’ in a common grave in consecrated ground, a fee of one shilling is to be charged for the use of the incumbent. The term ‘pauper’ is hardly known to the law, and certainly it has no precise legal meaning in this act. The word ‘poor,’ by the 4 & 5 Will. 4, c. 76, s. 109, is to be construed ‘to include any pauper or poor or indigent person applying for or receiving relief from the poor rate in England or Wales, or chargeable thereto.’ In the Lunacy Act, 16 & 17 Vic. c. 97, s. 132, the word pauper ‘shall mean every person maintained wholly or in part by or chargeable to any parish, union, or county.’ But a pauper is not necessarily a person chargeable to or in the receipt of relief from the poor rates, for a person who lives upon the bounty of another is equally a pauper with the one who is supported out of the poor rates. A pauper, says Dr. Johnson, is a poor person; one who receives alms. It was doubtless intended that the fee of one shilling should be paid in those cases only in which the burial takes place by direction of the board of guardians of the union comprised within the city of London and the liberties thereof; and so far as those guardians are concerned no question can arise. There are, however, numerous persons supported by charitable gifts and otherwise in the city of London, who, it may be contended, are also ‘paupers,’ and for whose burial, therefore, a fee of one shilling only can be demanded. Certainly there is nothing in the Act which confines the term ‘pauper’ to the burial by direction of the guardians of the body of a poor person in the receipt of relief from or chargeable to the poor rates. The 15 & 16 Vic. c. 85, s. 49, which, as regards the metropolis, is confined to the cemeteries mentioned in schedule B. of that act, speaks of burial ‘at the expense of any union or parish,’ and does not mention the term ‘pauper.’”

We have no doubt that Mr. Glen’s work will prove to be not only useful, but almost indispensable to those who are connected with burial boards and boards of guardians of the poor; and the general practitioner who may have occasionally to transact business involving any portion of the law relating to burial boards will certainly find his labours much abridged if he have this small volume at hand to consult as occasion may require.

Solicitor—Purchase by.—An objection to a purchase as being by a solicitor from his client cannot be taken by a third party (*Knight v. Bowyer*, Week. Rep. 28).

CLERGYMEN PREACHING OUT OF PARISH.

The late case of the interdiction by a parish clergyman of the services in Exeter Hall has called attention to the law on the subject of the parochial clergy and their rights; and a bill has been introduced in the Lords to sanction, under certain circumstances, the celebration of divine service by a clergyman out of his parish. The clergyman whose interference led to the discontinuance of the above services states that he was advised that the 18 & 19 Vic. c. 86 (see 2 Law Chron. 148, 149) in no way dispensed with the necessity of his sanction being obtained. He adds, "That act, as I am informed upon competent authority, merely renders inoperative the provisions of three previous statutes, one of which, as appears from the title, is only for Protestant Dissenters, and the two others (irrespective of the internal evidence to the like effect) have been judicially declared by Lord Hardwicke and by Sir John Nicholl (as judge of the Court of Arches) not to relate to the clergy of the Church of England. Upon this point I cannot do better than quote the words of the late Justice Bayley in the case of *Farnworth v. The Bishop of Chester* (4 B. and Cr. 555). He says (p. 570), 'If the vicar has the cure of souls co-extensive with the whole limits of his parish, that casts a very serious and important duty upon him, and he has a right, and is bound, as the conservator parochialis, to take care that no person shall deliver doctrine in that parish except under his sanction and authority. It is said that the bishop will never appoint an unfit person; but if the vicar has the cure of souls in the parish, he has a right to act on his own judgment, and is not bound to trust to the judgment of the ordinary.' I also take the liberty of mentioning the following cases, all of which have reference to points now brought forward:—*Rex v. The Bishop of London* (1 T. R. 331); *Dr. Trebec v. Keith* (2 Atk. 498); *Moysey v. Hilcoat* (2 Hagg. 30); *Bliss v. Words* (3 Hagg. 486); *Carr v. Marsh* (2 Phillim. 198); and *Barnes v. Shore* (8 Ad. and El. 640)."

MARRIAGE WITH DECEASED WIFE'S SISTER.

We have always maintained the invalidity of a marriage with a deceased wife's sister, even though celebrated out of this country, and though the marriage would be valid in the country of marriage (2 Law Chron. 16—19; First Book, 107). The recent decision of Cresswell, J., in *Brook v. Brook* (30 Law Tim. Rep. 188; 6 Week. Rep. 110), fully confirms this view. His lordship first con-

sidered whether this marriage would have been voidable in the Ecclesiastical Court before the passing of the 5 & 6 Will. 4, c. 54, because, if so, it would be void after that enactment. Had it been celebrated in England it was clearly voidable before that statute, as having been celebrated between persons "within the Levitical degrees, and prohibited from marrying by the Holy Scriptures, as interpreted by the canon law and by the stat. 25 Hen. 8" (per Parke, B., in *Sherwood v. Ray*, 1 Moo. P. C. 395; see also *Reg. v. Chadwick*, 11 Q. B. 205). And in answer to the contention that by the law of nations the question of its validity was to be decided according to the law of the country where the marriage took place, his lordship said that no decision could be found in which such respect had been paid in this country to the law of a foreign country recognising a marriage contrary to what we deem to be God's law. In the absence of such direct authority, writers on international law were resorted to, and among these, of course, Story's *Conflict of Laws* was mainly relied upon. After stating the general principle to be that if a marriage is valid where it is celebrated it is valid everywhere, and that among the most prominent exceptions to this rule are marriages involving polygamy and incest, that learned writer proceeds to confine this doctrine against the recognition of incestuous marriages to such cases as by the general consent of *all Christendom* are deemed incestuous (sects. 113, 113a, 114). From this last position, Cresswell, J., dissents. "How is a judge," he asked, "sitting in an English court of justice, called upon to decide whether a marriage be incestuous or not, to be guided in his decision? Surely, if the law of his own country has already settled what is incestuous or the contrary, by that he must be governed. Is he to inquire into the opinions of all other nations in which Christianity exists, and to adopt that rule which is ascertained to prevail among the greater number, and to say that it shall be acted upon in defiance of the law of his own country? This would, indeed, be enlarging the *comitas gentium* to an extent hitherto unheard of." The general expressions attributed to writers respecting the legal ubiquity of obligation which attaches to marriages celebrated according to the *lex loci contractus* are, in the learned judge's opinion, to be restrained by an implied proviso that such marriages are not contrary to the laws of this country, and apply only to the forms and solemnities of constituting a marriage, and to the proof of the parties having made a contract. With regard to the question whether the 2nd section of stat. 5 & 6 Will. 4, c. 54, is so framed as to be binding on all English subjects, wherever they may be, his lordship considered that the

Sussex Peerage case gave a decisive and satisfactory answer. The words of that section are, that "all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever." The words of the section (12 Geo. 3, c. 11, s. 1) involved in the Sussex Peerage case are, that no descendant of George II. shall be capable of contracting matrimony without the consent of his Majesty, and that "every marriage of such descendant without such consent shall be null and void." Tindal, C. J., in expressing the opinions of the judges upon the question referred to them, said of this enactment, "The words of the statute itself appear to us to be free from ambiguity. The prohibitory words of it are general. . . . The statute does not enact an incapacity to contract matrimony within one particular country and district or another, but to contract matrimony generally and in the abstract. It is an incapacity attaching itself to the person of A. B., which he carries with him wherever he goes. . . . The words employed are general, or, more properly, universal, and cannot be satisfied in their plain, literal, and ordinary meaning; unless they are held to extend to all marriages, in whatever part of the world they may have been contracted or celebrated."

"The whole of this passage," said Cresswell, J., "might have been written with reference to the statute of William IV.; which does not enact an incapacity to contract matrimony within the prohibited degrees within one particular country and district or another, but to contract such marriage generally." "The object of the statute," he added, "was to put an end to all such marriages between English subjects for the future, and could not be satisfied by any narrower construction."

MOOT POINTS.

No. 24.—*Killing Rabbits—Surcharging.*

A. B. has a written notice to shoot and kill rabbits on land belonging to C. D., can A. B. be surcharged, not having a game certificate, and why? F. W.

No. 25.—*General Devise—Trust Estates.*

A. B., in his will, after certain specific devises, which, with his debts, &c., he charged on a particular estate, thus expressed himself: "All the rest and residue of my estate and effects I give and devise unto my grandson, C. D., whom I hereby appoint residuary devisee and legatee. I give a legacy of £100, payable out of the residue aforesaid, unto E. F." There being, in the said will, no mention made of trust estates, I should be glad if some of your

correspondents would inform me whether the general devise above would, in their opinion, be considered sufficient to pass trust estates, and whether the testator, having rendered his residuary bequest liable to the payment of a legacy, would at all affect the point? H. M.

No. 26.—*Borrowed Horse not returned to Lender.*

A canal carrier intrusted to the care of one of his men a sum of money to buy a horse, and promised him to lend him the horse to go one journey (as his boat was loaded, and the man had lost his own horse), on condition that he brought the horse back to his master on his return. The man went and bought the horse, and went his journey, and brought his boat back, but not the horse (although his master had demanded him), but has since sold him. Can the master recover the horse from the purchaser if not sold in market overt? And is the offence of the man a felony? And can the master punish him by the common law, or must he proceed under the Fraudulent Trustees Act? W. H. F.

ANSWERS TO MOOT POINTS.

No. 19.—*Articled Clerk (ante, p. 216).*

By referring to the 6 & 7 Vic. c. 73, s. 6, I find that the solicitor cannot be compelled to allow his articled clerk to spend the last year of his articles at a London agents, without there is an agreement introduced in the articles to the contrary. I am of opinion, that it is clearly the duty of an articled clerk to copy, &c., when desired to do so by the solicitor; it is, in fact, part of what he has to learn. The duties are so different in some offices, that I cannot give an opinion on the second question in the moot point.

W. F. S.

No. 19.—*Articled Clerks (ante, p. 216).*

It is certainly the strict duty of the clerk (when the usual clauses are in the articles) to copy abstracts, wills, &c., and engross. A respectable attorney, who rightly understood the way to deal respectfully with a clerk who was a gentleman, would not press the latter task except under pressure of business; and to this no right-minded articled clerk should demur. Indeed, the servitude of an articled clerk with his attorney-master must be carried out with the "giving" and "taking" system. Abstracting—with a determination to understand what you are doing—is admirable schooling for a clerk. For an answer to the second query, I refer to "Warren's Law Studies," an authority which, as it appears to me, will set our friend the querist right perhaps on these and other points, and furnish useful aid for the future. In reply to the third query, a simple "No" seems to be all that it is necessary to say. F.

No. 21.—*Specific Performance with Compensation*
(*ante*, p. 216).

Sugden, on the Law of Vendors and Purchasers, ch. 7, sec. 56, says, "A right to dig for mines not disclosed would be a ground to set aside the contract at the instance of the purchaser. But when the purchaser does not object to the title on this ground, but insists upon a specific performance with a compensation, it will be decreed." *Seaman v. Vaudry* (16 Ves. jun. 390).

H. M.

No. 21.—*Specific Performance with Compensation*
(*ante*, p. 216).

I think that the purchaser in this instance would undoubtedly be entitled if he chose to enforce a specific performance of the contract as far as lays in the vendor's power, and might claim a compensation for C.'s right of mining. In all contracts for sale of real estate, an agreement to make a good title is always understood; and all the vendor's interest is implied in the absence of any provision to the contrary (*Sugd. V. and P.*, p. 14, pl. 13, 13th ed.). An undisclosed right to dig for mines would be a ground to set aside a contract at the instance of the purchaser; but the purchaser may take the title with a compensation (*Sugd. V. and P.*, p. 258, pl. 45, 13th ed.). In *Seaman v. Vawdrey*, a case much in point, there was an undisclosed reservation of salt mines with a right of mining, and, on a suit by the purchaser, the title was held to be bad, but he accepted it with a compensation (*Sugd. ubi sup.* 16 Ves. 390; *et vide Sugd. V. and P.*, pp. 253, 254, 255, and 256), and the cases there cited, which seem to establish it as a general, though not invariable rule, that in such cases the purchaser can oblige the vendor to give him what he has, with a compensation for the deficiency.

A. A. C.

No. 22.—*Devise—Lapse—Jointure* (*ante*, p. 216).

In default of any appointment by B., F.'s share would undoubtedly go into the testator's residuary bequest; but if B. is still living, and has not renounced his power of appointment, he has a right to appoint to E. and G. in such shares as he likes, to the exclusion of F. even had he been living (it being a discretionary power given to B.).

Would H. W. kindly inform me of the meaning of his last question relative to jointure? H. M.

ARBITRATION.—ADMINISTERING OATH.

In the recent case of *Simmonds v. Moss* (5 Week. Rep. 559; S. C., 4 Law Chron. 27), it was laid down that an arbitrator cannot administer an oath to witnesses unless that power was expressly given by the order of reference.

It is rather surprising that Mr. Justice Crompton,

before whom the above case was tried, and whose promotion to the judicial bench was chiefly owing to the reputation he enjoyed of being intimately acquainted with minute points of law, should have been unaware of the existence of a statutory enactment expressly contradictory to the doctrine he laid down. Still more surprising is it that the other parties to the case and the reporters should have been ignorant of its existence. By 14 & 15 Vic. c. 99, s. 16, it is enacted that "every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively."

P. S. O.

NOTE.—The statute referred to by our correspondent does not appear to have been noticed in the argument or judgment.—Eds.

LAW LECTURES.

PROFESSOR JOHNSON'S INTRODUCTORY LECTURE.

We have before (p. xix.) called attention to the appointment of Mr. Johnson to the Professorship of Law in the Queen's College, Birmingham, and we now have the pleasure to insert a short note of the more important parts of his introductory lecture. The special difficulties in the study of the law were, in the professor's opinion, principally the following:—First, its great extent of detail; secondly, its historical complications; and thirdly, its equivocal and unscientific terminology. With respect to the first difficulty, he observed, it was seldom comprehended in its full extent by the profession itself, from the circumstance, which, above all others, was the best proof of its existence—namely, the division of labour in the profession. This was carried to a much greater extent among barristers than attorneys; a barrister at the outset devoted himself either to the common law bar or the Chancery bar, and in the latter case had the choice between forensic and chamber practice. Attorneys and solicitors, although they could not generally choose or refuse any particular class of business at the outset of their professional career, yet, after some years of practice, either by force of inclination or circumstance, confined themselves to some department, as conveying, common law, or bankruptcy, and troubled themselves as little with other departments as they could help. Candidates for this branch of the profession must, however, recollect that both at their examination and in their daily intercourse with clients, it was forbidden to them to remain in the total ignorance of every department other than their

own, which was permitted to members of the bar. An attorney was not expected to be a great equity lawyer, or a great common lawyer, but he was expected to know much more about equity than many a *Nisi Prius* advocate, and more about common law than many a Chancery barrister whose reputation was great at Lincoln's Inn. Mr. Johnson then quoted statistics showing the enormous mass of details of which the two great divisions of English law—the statute law and the decisions of the courts—were composed. This complexity, he observed, was still further increased by the second difficulty to which he had referred—the historical complications of the subject. It was a peculiarity of English law—a peculiarity which was inherent in our national character, and to which much of our national greatness was owing—that every progress was not change, but growth. To quote the words of Macaulay, "There never was a moment in which the chief parts of what existed was not old." The moral and political consequences, the lecturer said, he could not stop to explain; they would be found explained by the author he had just quoted, in the first chapter of his *History*, with all his amplitude of historical illustration and splendour of rhetoric. The consequence to the student of law was, however, to increase his labour; for, unlike the exact or pure sciences, the basis of English law was altogether historical. Not to understand this, and then to investigate a legal question, was like one placing himself out of distance to view a picture—nothing but confusion would result. They might have observed that a *History of England* was now being written by Mr. J. A. Froude, derived almost altogether from the records of the past, embalmed in the statutes at large, and to such an extent was a knowledge of legal history necessary to a sound lawyer, that he would undertake to verify either of two propositions; first, that there was no legislation or form of procedure which had ever taken root in our system which was not necessary to be known, not perhaps for the usual routine of practice, but for the thorough comprehension of more abstruse or recondite legal questions; secondly, that no act of the Legislature or decision of the courts could be understood or safely acted upon by one not conversant with the previous law, or no law, on the question. They might sometimes hear of consolidation statutes; but when closely examined, they found that, like the last consolidation of the bankrupt law, it was very partial and incomplete. As instances of the prevalence of the historical element, the lecturer stated that the form of a common money bond related back to the time when the taking of any interest for money was looked upon as impious, and the just right of the creditor had to be secured by legal contrivance and subtlety. The entailing of estates

involved the knowledge of a statute made in the year 1285; and a case decided in the year 1472. A common conveyance of freehold derived its efficacy partly from a tenure as old as the Conquest, and partly from a statute of the reign of Henry the Eighth. The commonest legal terms were, as had been said, "fossil history." In the much-used phrase "*Nisi Prius*" they had at once a remnant of an old procedure, and a record of bygone customs. The third difficulty—the equivocal and unscientific terminology of the law—necessarily resulted from the the two former, and was as great a hindrance as either of them. The study of history would show them that all nations were placed in the dilemma of having a constitution and system of law symmetrical and logical in theory—and, therefore, made and not grown—and unsuited to the genius of a free people—or of having laws continually made for the occasion, growing with the growth of the nation, and, therefore, unsystematic and inconsistent. He need not say that English law belonged to the latter class; and the result was, that, in the struggle of conflicting principles, technical language had been utterly ruined. Almost every technical term had duplicate and triplicate meanings thrust upon it, until, like the word "felony," it had become an example of bad definition for writers on logic, like Mr. John Stuart Mill, to scoff at. The terms "equity," "warranty," "contingent remainder," and "debt" were quoted by the lecturer as additional examples of the want of precision in the use of terms. The definition of debt given in the best modern text-book, Stephen's *Commentaries*, was that it was "a legal relation or predicament," which the lecturer observed might be predicated of almost every circumstance of life. In concluding his lecture, the professor observed "that had he thought that his office would be to read a legal essay, and bow to the class at the beginning and the close, he would never have sought the honourable position he found himself placed in. The two objects he proposed to himself were, not so much the cramming them with legal knowledge as the gradual and systematic inculcation of a practical and correct method of acquiring knowledge, and forming sound judgment on legal questions; and, as a subordinate object, the preparation for their examination. This he put as secondary, and would tell them that any student who looked upon that as the only reason for study had mistaken or was unworthy of his profession. Still, however, the examination had to be prepared for; and by questions given at the close of each lesson he should endeavour to prepare them for it. His great aim would, however, be to teach them the theory of the law in and through its usual practice—to make, if possible, the routine of their duties

instinct with life and interest, by connecting it in their minds with the history of their country and the principles of human action. He had a strong belief that the most technical legal doctrine, and apparently the most absurd or antiquated procedure, could be shown to have, or once to have had, a good reason or foundation in human nature. If he could succeed in effecting this, in ever so small a degree, he should do for them a greater work than the mere communication of knowledge—he should give them a method which would aid them in the investigation and understanding of the law, however numerous might be its changes, and more than that, give something of interest in their profession. It was not creditable to any member of a liberal profession that its practice should be regarded like a game at cards, which, being well played, certain results would follow, but which had in itself no certain method or intrinsic interest. In conclusion he would say that in every scheme for the better education of the legal profession, the public had a greater interest than they were aware of. In the other learned professions of theology and medicine, the importance of an interest in them for their own sake, and not for their rewards, had long been seen. What, he would ask, had raised the medical profession in public estimation and usefulness, so much as the interest most of its members felt in medicine as a science, and the great exertions they made to promote it, of which indeed the College wherein they were assembled was a noble illustration. He would not say that interests of this kind could be the primary motives of honourable action; but of all the secondary causes, he knew none more powerful than that any class of men should work in their vocation because they understood it, and were interested in it, as well as because they gained their livelihood by it; and in doing this they would find that they would not only promote their own welfare, but raise themselves in the estimation and promote the well-being of the body politic to which it was their honour and happiness to belong.

LAW OF PARTNERSHIP.

An able paper, read by Mr. J. M. Ludlow at a recent meeting of the Juridical Society, on the subject of "The Mercantile Notion of 'The Firm,' and the need of its Legal Recognition," contains much practical information respecting the law of partnership; and we propose, therefore, to notice those portions which will be of service to our readers. Mr. Ludlow first stated that there is more or less recognition of that ideal personage "the firm;" of the relation of the

partners towards it as that of agent and principal, surety and debtor; of the signature of the firm, as establishing the validity of contracts, sometimes of the conclusiveness of partnership accounts, generally of the power of the firm to sue and be sued as such in courts of justice. He then proceeded to state a few instances of confusions which have resulted from the struggles necessary to secure this recognition, among which are the following:—

1. *Interest of Partners in the Stock.*—The mercantile view presents here absolutely no difficulties. The firm is the only real owner of the partnership stock, the only person having any actual interest in it. The partners, its general agents, have no interest in the stock; they have only powers. But the common law could not recognise the personality of the firm. The only ideal persons it knows of are corporations. The Crown alone, it holds, can create corporations, though that power may sometimes be delegated, and sometimes the existence of such ideal persons may be recognised, without its being very clear how they grew up; but to admit that Jack and Tom, by clubbing together £10 each, can make a person called a firm, is more than any common law imagination could reach to. In fact, it would be a contempt of the royal prerogative. What was to be done? Those obstinate persons called traders, at first Lombards and Jews, would enter into this kind of joint trade, which they called partnership—would regulate it according to their own notions, and not according to the perfection of wisdom; and it was not the policy of this country to put them down altogether. How, then, was law to be administered towards men who persisted in making law for themselves? How were their fantastic notions to be translated into the Queen's legal English? I suspect that common lawyers made the attempt with only half a will, cherishing secretly the hope that Jews and Lombards, with their commercial notions, would some day be expelled the realm. At any rate they succeeded very ill in what they did attempt. Not recognising the firm, they consequently could not recognise its ownership of the partnership stock. They had, therefore, to recognise an actual interest in the partners. This was very oddly defined.

Of the various modes in which property could be held without division by more than one owner, joint tenancy is expressly distinguished by the common law through this characteristic—that, on the death of one of the joint owners, the whole of the object owned passes to the survivor. The nature of the joint tenancy is, says Littleton, "that he which surviveth shall have only the entire tenancy." "Joint tenants have a sole quality of survivorship," says Lord Coke, "which coparceners have not." Yet the legal definition of the partner's interest is,

that it is a joint tenancy without benefit of survivorship as between the partners themselves but with survivorship in regard to third persons who may sue or be sued by the survivor. Could not one almost fancy such a definition to have been introduced in a moment of grim fun by some crabbed legal sage, for the sole purpose of puzzling the brains of the Lombard merchants? for it follows clearly from what we have seen above, that a joint tenancy without benefit of survivorship is about as rational an expression as a round square, or a dark light. Absurd or not, however, this is the legal view of the partnership interest. Sir E. Coke says of two joint merchants or partners, "the wares, merchandises, debts, or duties that they have as joint merchants or partners shall not survive, but shall go to the executors of him that deceaseth"—very loose wording, to say the least, on the part of such an authority; since it would imply literally that the executors of the deceased partner took the whole, to the prejudice of the surviving one. And it has been held in a late case, that the title to partnership chattels does not survive; and that a surviving partner cannot mortgage a deceased partner's share for the purpose of carrying on the trade. But now, after the common law has spoken of the partner's interest in the stock as a joint tenancy without benefit of survivorship, equity is found running upon an exactly opposite tack, and dealing with it as a tenancy in common. It does this so positively, that, according to a well-known rule, wherever property is left to two jointly for the purpose of a trade, and is so dealt with accordingly, this is held actually to sever the joint tenancy, as it is termed, unless there be something in the will to preserve it. Where a will bequeaths leaseholds and personalty in terms clearly amounting to joint tenancy, such a severance was presumed from the fact of the parties dealing with it as partners, and that from the time of their entering into possession; and although, according to these views, land intended for partnership purposes is equally conveyed to partners as tenants in common, still, as in the case of a will, so in that of a purchase, the mere circumstance of partnership is sufficient to draw the same consequence, whatsoever be the form of the conveyance. In the case of a joint lease taken or a fee purchased to carry on the joint trade, "the court," to use Lord Thurlow's words, "will convert the joint property for the purposes of trade and making a common advantage." So that, putting these various rules of law together, we come to the curious conclusion that the interest of the partners in the stock is a joint tenancy, without benefit of survivorship, which is severed from the time of their entering into possession: in other words, a thing contradictory in itself, which is born

and dies with a breath. In attempting to give to a class of working men some notion of our English law of partnership, I had to come across this branch of it, and to dismiss it in these terms:—

"I shall be able to tell you something of the portions in which the partners are deemed to be interested in the stock and profits; I shall be able to tell you what becomes of the stock on dissolution of the partnership; I shall be able to tell you what powers may be exercised over it by the partners during the partnership or its winding up; but what the nature of their interest is I cannot tell you, for I really do not know."

2. *Powers of the partners over the assets.*—How perfectly inconsistent the legally recognised powers of the partners over the stock are with any legal statement of their interest in it, is sufficiently shown by a single example. Neither joint tenants nor tenants in common have any power to dispose of more than their own individual share of the thing held in fellow-ownership. But when we look to those anomalous forms of commercial fellow-ownership called partnerships, we find each partner invested with a sole power of disposing of or pledging the partnership assets, so far at least as they do not consist of land. Nothing simpler, if with the trader you consider the partnership property as that of a single owner—the firm, and each of the partners as being a joint and several agent or attorney for that owner. But nothing more exceptional, if you attempt to refer the act to the exercise of any recognised form of fellow-ownership.

In order, therefore, to explain the exercise of these anomalous powers of partnership, the law is driven to borrow an idea from a different sphere from that of the rights of property—that of the partnership agency; the nearest approach which it could make to the mercantile idea of the agency of the partners for the firm was to consider them as agents each for the other of them. "The general principle which governs all partnership in trade," it has been said, is this—"that each partner constitutes the others his agents for the purpose of entering into all contracts for him within the scope of the partnership concern."

3. *Partnership dealing with land.*—The full and frank recognition of this mutual agency of partners, to its utmost possible extent, even without a legal recognition of the firm, would have gone far to cure many of the practical difficulties of partnership. For instance, if one partner, as agent for the other, has power to pledge or dispose of the personal property of the partnership, there seemed no reason why he should not equally have power, as such agent, to pledge or dispose of its real property. Had this been the case—had land, once brought into partner-

ship, been wholly assimilated to other partnership stock, for the purposes of the partnership, an immense impetus would have been given to commercial enterprise, and a whole head of most perplexing and much litigated law would have been absent from our treatises.

But here the common law took its stand. As soon as the land was in question, it immediately threw aside the idea of the partnership agency, and betook itself to the consideration of the partner's interest in the land; neither joint owner nor tenant in common could dispose of the whole of the real or personal estate held jointly or in common. Therefore, the partner might dispose of the whole of the personalty, and of his share only of the realty.

The paper then proceeded to discuss, at length, the state of our law, as regards the incapacity of one partner to bind others by deed; the equitable doctrines as to land brought into partnership; the remedies on partnership contracts for or against strangers; the remedies as between partners themselves; proceedings by partnerships in bankruptcy; and the bankruptcy of partners. On the last-mentioned subject, the paper, having stated the rule of the Court of Bankruptcy, which distributes the separate estate amongst the separate creditors, and the joint estate amongst the joint creditors, continued—

This rule was not admitted without difficulty, and its anomalous character is obvious, when it is compared with the legal doctrines of partnership liability. The law makes each partner liable for all the debts of the firm, and allows the creditor execution against his separate estate. But in bankruptcy, his position is wholly changed. The day before, the joint creditors might have levied on execution the whole twenty shillings in the pound of their debts, out of the joint and separate property; but now they must be content with a dividend, while the private creditors are paid in full. When there is no property—no solvent partner—the joint creditors are entitled to prove against the separate estate, but the least amount of joint property withholds from them this benefit. A joint estate of £13, which must be swallowed up in costs, has been held sufficient to preclude them, until all the separate creditors had been paid in full.

But what are the consequences, as between partners themselves, when a separate adjudication takes place, for the time being, against one only? By s. 140 of the Bankruptcy Consolidation Act, joint creditors are entitled to prove, for the purpose only of voting in the choice of assignees, and of being heard against the allowance of the bankrupt's certificate, but are not to receive dividends out of the separate estate until all the separate creditors are

paid in full. The result is, that, so long as the joint creditors see any chance of recovering their debts against any other partners, they will never take any trouble to move in the separate bankruptcy. The separate adjudication secures at once to the bankrupt a *quasi* limited liability against his trade demands. This could not take place if the principles of mercantile accounts were admitted—if the claim of the firm as a creditor against the separate estate of the partners were capable of proof.

THE PRIVILEGE OF REPORTS. — LIBELS IN NEWSPAPERS.

The report from the Select Committee of the House of Lords on the Privilege of Reports has been published. The committee have agreed to the following resolutions, viz.:—1. That the prayer of certain petitioners that there shall be entire immunity for the publication in newspapers of all that is spoken at all public meetings, if the report be faithful, thus depriving persons calumniated of all remedy, save against the speaker, cannot safely be granted. 2. That faithful reports of the proceedings of either House of Parliament, at which strangers have been permitted to be present, shall have the same privilege as is now granted to faithful reports of the proceedings of courts of justice. 3. That if an action shall be brought for an alleged libel, it shall be competent for the defendant, in addition to any other plea, to plead "that the alleged libel was part of the report of the proceedings of a public meeting lawfully assembled for a lawful purpose, and that the said report is a faithful report of the said proceedings of the said public meeting, and that the plaintiff has sustained no actual damage by the publication of the alleged libel," and that on proof of this plea the jury should be directed to find a verdict for the defendant; and 4. That a public meeting for this purpose shall be a meeting lawfully called by the sheriff of a county or other public functionary to petition the Queen or either House of Parliament, or a meeting for the election of members of Parliament, or a meeting of the town council of any city or borough, or a meeting held under the authority of an Act of Parliament for imposing rates on, or regulating the local affairs of, any district. The second resolution was only carried by five to three, and the rest of the resolutions *non dis*. The witnesses examined before the committee were Mr. E. Baines, Mr. Alexander Dobie, Mr. T. Curson Hansard, and Mr. A. Ely Hargrove.

PROBATE AND DIVORCE, &c., COURT.

Orders by her Majesty in Council have been issued appointing the 11th day of January instant as the period for the coming into operation of the new Probate Act and the Divorce and Matrimonial Causes Act (*ante*, pp. 157—160, 165—169, 215, 216).

With respect to the Probate Act, the order directs that the said recited act (except where otherwise specially provided) shall come into operation on the 11th January next; and her Majesty, by and with the like advice, is further pleased to order and appoint, and it is hereby ordered and appointed, that the above-mentioned Court of Probate shall hold its ordinary sittings in any of the courts in Westminster Hall which can be conveniently used for the purpose, and shall have its principal registry in the city of London, in the building now used as the public registry of the Prerogative Court of the Archbishop of Canterbury."

As to the Divorce and Matrimonial Causes Act, the order directs that the said recited act shall come into operation on the 11th January next; and her Majesty, by and with the like advice, is further pleased to order and appoint, and it is hereby ordered and appointed, that the above-mentioned Court for Divorce and Matrimonial Causes shall hold its sittings in any of the courts in Westminster Hall which can be conveniently used for the purpose.

THE MONTH'S SUMMARY.

Joint-Stock Company—Winding up—7 & 8 Vic. c. 110, s. 29—Director being contracting party—Purchase of goodwill of business—Notice.—As we have before seen (*ante*, pp. 149—152), there is no remedy, either at law or in equity, against a company upon any contract to which a director of the company was a party, and in which he was interested, unless the requirements of the 29th section of 7 & 8 Vic. c. 110, have been complied with (*Sea Fire Life Assurance Society v. Port of London Shipowners' Loan and Assurance Society*, 6 Week. Rep. 24).

Metropolitan county courts—19 & 20 Vic. c. 108, s. 18—Residence of plaintiff.—The following decision has been noticed at greater length in the "Summary" in the present number. A plaintiff, in a metropolitan county court, since the 19 & 20 Vic. c. 108, s. 18, failed in his suit, because it appeared that neither he nor the defendant resided within the jurisdiction of that county court, and that the cause of action arose elsewhere. The plaintiff then came to reside within the jurisdiction, and, a few days

afterwards, took out a fresh summons: Held, that he was entitled to do so. *Per Martin, B.* A man may come to lodge within the jurisdiction of a county court for which he has a predilection, for the express purpose of bringing an action there (*Massey v. Burton*, 3 Jur. N. S. 1130).

Will—Competency of testator [ante, pp. 123, 124]—Onus probandi—Presumption.—A party propounding a will, is bound to show that it was executed by the testator, and that he was of a sound and disposing mind; but if there is nothing irrational about the document, the jury will be directed to find for the will without proof of sanity (*Sutton v. Sadler*, 26 Law Journ. C. P. 284; *ante*, pp. 123, 124).

Discovery—Ejectment.—A plaintiff in ejectment is not entitled to a discovery of the defendant's title (*Horton v. Bott*, 5 Week. Rep. 792).

Arrest—Sheriff—Arrest on void writ—Detainer on other writs—Ca. sa.—Fi. fa.—Duties of sheriff—Liberty of the subject—Review of the authorities.—We have elsewhere shortly noticed the following case, but its importance merits further consideration. It is established that, where the sheriff has arrested on one good and valid writ, he may detain on any number of valid writs which he had at the time of the arrest, or which may afterwards have reached him. But in the case of an arrest on an invalid writ it is different. Though the party arrested has been deprived of his liberty, that has been done in circumstances which make it the duty of the sheriff to discharge him. He has no right to treat him as a person deprived of his liberty, and an arrest on the valid writ is therefore necessary. But to allow the sheriff to make such an arrest, while the party is unlawfully confined by him, would be to permit him to profit by his own wrong, and therefore cannot be tolerated. The sheriff cannot arrest him, because he has already been deprived of his liberty; the sheriff cannot detain him, because he is entitled to be discharged. *Barratt v. Price* (9 Bing. 566) confirmed. If the sheriff, by the illegal act of himself or his officer, has taken a person unlawfully into custody, so that the custody amounts to a false imprisonment, the sheriff cannot avail himself of that illegal detention to execute against his body other writs which he holds at the suit of other plaintiffs. The liberty of the subject requires that a person illegally arrested should have an absolute unqualified right against the person who has illegally arrested him, to be set at large without reference to what may be the consequence of his liberation to others. Though for some purposes the sheriff is the agent of the party who puts a writ into his hands, he is not a mere agent. He is a public functionary having duties to perform as well towards those against whom the writs in his hands are directed as towards those who put those

writs into his hands. The sheriff S. held a ca.^{sa}. against B., lodged by L. more than one year before. A writ at the suit of A., but void on the face of it, was then handed to S., who issued his warrant to his officer, who arrested B. thereon. B. applied to a judge at chambers and was discharged, whereon S. claimed to detain him on L.'s writ. But the judge discharged B. absolutely, and he left the country. L. then sued S. for negligence, the declaration alleging as the first breach the non-arrest, and as a second breach the arrest of B. on an invalid writ, whereby B. was discharged, and thereby L.'s writ became useless. S. pleaded not guilty to the whole declaration, and traversed particular allegations. The judge at the trial ruled that there had been no arrest on L.'s writ; that it was for the jury to say if S. was guilty of negligence towards L. in not knowing that A.'s writ was invalid, and that B was set free from all writs by his discharge, which was no justification of S. The jury having found for the plaintiff, except on the issue on the second breach, and a bill of exceptions being tendered: Held, affirming the judgment of the Ex. Ch. (Wightman, J., Erle, J., Martin, B., and Bramwell, B., dissenting), that the ruling was right, (*Hooper v. Lane*, 30 Law Tim. Rep. 33).

Legal Status of an Englishman in France.—The following general statement of the legal status of an Englishman in France, may be interesting and even useful to our readers:—"Great facilities are given by the law of France for the arrest of a foreigner when the creditor is a Frenchman, and many an unfortunate Englishman has been incarcerated upon overdue bills of exchange (often obtained from him fraudulently) indorsed to a Frenchman. As, however, in the majority of cases, the party is not a *bonâ fide* holder for valuable consideration, but merely a man of straw who lends his name for the occasion (technically called a *prête-nom*), the debtor generally succeeds in obtaining his liberation on showing to the court the real nature of the transaction, and getting the arrest declared illegal. This, however, requires some time to effect, as if he succeeds in the Tribunal de Commerce, the nominal creditor appeals to the Cour Impériale, and months elapse before a final judgment can be obtained. In the meantime the unfortunate debtor must remain in prison, unless he can deposit the amount claimed in the Classe des Consignations, or give bail; and as the surety is not only answerable, as in England, for the appearance of the debtor, but also for the payment of the debt and costs in case judgment is given against him, and he is unable to meet the demand, it is almost impossible for a foreigner to find a substantial person willing to undertake responsibility. In England no distinction

is made as to liability to arrest between a British subject and a foreigner, as neither can be arrested on *mesme process* (that is, before judgment), unless the creditor can prove, to the satisfaction of a judge, that the debtor intends to leave the country. Art. 11, tit. 1, liv. 1, of the *Code Napoleon*, says:—'*L'étranger jouira en France des mêmes droits civils que ceux qui sont ou seront accordés aux Français par les traités de la nation à laquelle cet étranger appartiendra.*' It is not, however, sufficient that certain rights are accorded to Frenchmen by the laws of a foreign country for the subjects of that country to enjoy the same privileges in France; the reciprocity must be expressly stipulated for by treaty, (see Rogron's note on this article in his *Code Civil Expliqué*). Now, no treaty exists which puts Frenchmen in England and Englishmen in France upon an equality as to arrest for debt, the former enjoying in England the same privilege in that respect as a British subject, purely and simply by the law of the land. It strikes me, however, that if the case were brought officially to the notice of the French Government, they would admit the equity of the claim of British subjects to enjoy in France the same privileges as the law of England accords to Frenchmen in that country; and the cordial alliance which now exists between the two nations, the high sense of justice of the Emperor of the French, and the well-known zeal of our ambassador at Paris, seem to render the present moment peculiarly favourable for obtaining the desired object."

Sir William Follett.—If it had pleased Providence to prolong his days, he would have afforded a nobler subject for some future biographer than most of those whose career it has been my task to delineate. When he was prematurely cut off, the highest office of the law was within his reach; and I make no doubt that by the great distinction he would have acquired as a judge, as a statesman, and as an orator, a deep interest would have been given to all the incidents of his past life, which they want with the vulgar herd of mankind, because he never sat on the bench, nor had titles of nobility conferred upon him. One most remarkable circumstance would have been told respecting his rise to be the most popular advocate of his day, to be Attorney-General, and to be a powerful debater in the House of Commons—that it was wholly unaccompanied by envy. Those who have outstripped their competitors have often a great drawback upon their satisfaction by observing the grudging and ill-will with which, by some, their success is beheld. Such were Follett's inoffensive manners and unquestioned superiority, that all rejoiced at every step he attained—as all wept when he was snatched away from the still higher honours which awaited him.—*Lora Campbell.*

THE BAR AND SOLICITORS.

The prospects of business at the bar are daily becoming more gloomy, but this does not appear to affect the number of entries at the inns of court—at least so it is asserted, but we much doubt the correctness of this statement. Viewing the matter from this point of view, many are now urging university men to become solicitors rather than barristers, but we must question whether this is a piece of judicious advice, for that branch of the profession is sufficiently stocked. It certainly would tend to elevate the status of solicitors, but this is being done in other ways. A writer in the *Saturday Review*, treating of this subject, says:—"The graduates of Oxford and Cambridge who are not born to independent fortune distribute themselves, though rather unequally, between the church and the bar. It is only the latter of the two professions which presents the spectacle of the unemployed practitioners enormously outnumbering the employed. The Church of England furnishes occupation and even bread (often very thinly buttered, it is true) to the great majority of clergymen, but the great majority of barristers fail to earn a shilling from their profession. So steady is the operation of the causes which send young men to the bar, and so little have they to do with the supposed attractiveness of professional prizes, that the supply of students of law varies inversely with the work to be done. While the legal business which has to be transacted by barristers has fallen off about one-half since the reforms in common law and equity procedure, we are informed that the entries at the inns of court have pretty nearly doubled. In any other country in the world except England, the state of the legal profession would be a great political danger. The assemblage within narrow local, and still narrower intellectual, limits of so much ability and so much high education, would trouble the sleep of ministers and spoil the enjoyments of despots. But in England the political evils of over-population at Lincoln's-inn and the Temples are not distinguishable from the moral mischief done to individual character. Parties and sects find their most unscrupulous instruments among the "gentlemen of the long robe," because scruples do not flourish in a moral atmosphere vitiated by the crowd which breathes it. The subject is one which has both a ludicrous and a melancholy side. Mr. Briefless and Mr. Dunup, the *par nobile* of *Punch*, seem likely to amuse many generations of men; but the actual examples of professional poverty can only be contemplated with a shudder. Some years ago, the trial of two unhappy wretches, man and wife, for

the ill-treatment of a servant girl, let in some rays of light on a domestic establishment in the Temple. The culprits had married on the income of a fourth-rate special pleader, and had set up their penates on a top floor in King's Bench-walk, where they had become literally brutalised by anxiety and poverty. When some surprise was expressed outside at such scenes occurring in a profession of gentlemen, it was whispered, we believe, in the inns of court, that the subject was not one to be probed too deeply, nor ought it to be too hastily assumed that the domestic condition of the couple was without a parallel. Probably, however, there are few men foolish enough to marry on the first fifty pounds brought in by drawing demurrers. The greater part subside into the life of club-celibacy, and prepare in their own way for the practice which probably will never come. The *dictum* that the law is a jealous mistress has had a remarkable effect on the lawyer of the present day. It is a great mistake to suppose—though very many venerable luminaries of the profession appear to be firmly impressed with the belief—that the unemployed barrister is nowadays too little devoted to law. As a matter of fact, devotion to law was never more exclusive; all infidelities are sedulously concealed or deeply repented of; and the consequence is that law destroys the moral stamina and exhausts the intellectual energy of a sensible fraction of each generation as completely and as heartlessly as any lady who ever wore camellias. For the prevailing belief in the jealousy of law produces the notion that it is better to do nothing at all than to do anything which is not legal. The result is that, during the weary interval which precedes the beginnings of success, many men have their faculties paralysed by sheer idleness; and this is very generally the case with the exceedingly common order of mind which requires active practical employment to keep its memory, and even its reasoning powers, to their work. Some there are, no doubt, who steadily accumulate masses of law which they have no opportunity of applying, and out of these are taken the few who succeed without the aid of connection. But it is to be hoped that success really does come at last; for there are few debasements of intellect worse than the seven-devil power of technical pedantry which overtakes the unemployed barrister who has expelled the demon of literary and scientific ambition, and swept all unprofessional knowledge out of the chambers of his mind.

The palliative for this state of things suggested by the *Law Review* is doubtless small enough; but it is easily practicable, and therefore important. Why should not university men become attorneys

and solicitors? The solicitors of the higher order are men of conspicuous intelligence, honour, and cultivation; the body to which they belong absorbs a much larger part than the bar does of the money paid by the country for legal assistance and advice; and their fitness for employment is guaranteed by a *bonâ fide* examination, the absence of which is steadily degrading the bar. Their designation as the "lower" branch of the legal profession would be a mere conventionalism, if it were not that there are certain walks of practice which lead an attorney deeper into the dirt than a barrister can easily go. But between the house of Quirk, Gammon, and Snap, and the leading firms of London solicitors, there is in reality no closer connection than between the Governor of the Bank of England and the gentleman who discounts a spendthrift's paper in money, pictures, paving-stones, and Amontillado sherry. That a young man commencing a struggle with the realities of life should consider himself necessarily lowered by becoming a solicitor, would be equally absurd with his looking upon himself as necessarily elevated by eating dinner for his call in the Inner Temple Hall, where his *vis-à-vis* at table may perhaps be Jim the Penman. Meantime, between the employment of a solicitor and that of a barrister, there is all the difference which there is between a fixed avocation and a lottery. A partnership in a firm of solicitors is a saleable commodity; and the capital and labour which the barrister invests in the purchase of a mere chance will always, if bestowed with tolerable prudence, buy for the solicitor a comfortable present living, and a fair prospect of future affluence. Nor should it be forgotten that, although nothing resembling the great judicial prizes is within the grasp of attorneys and solicitors, the number of lucrative offices appropriated to them has, of late years, been largely augmented. All notion, too, of the duties of the solicitors not being such as graduates of the universities are fitted for, should be absolutely discarded. We don't recommend a university man to join a partnership of Jew attorneys having a general retainer from Mr. William Sykes, or to lay himself out for advocacy in the county courts; but he may fairly hope to be preferred to others as a member of firms of the better and higher sort. The confidential solicitor has, nowadays, taken the place once filled by the priestly confessor. He advises in all domestic difficulties. He gets the hope of the family out of money scrapes, and saves the daughters from *mesalliances*. The best conventional standing is useful to the man who has to discharge these delicate offices; and a solicitor trained at Oxford or Cambridge would have a special advantage in that freemasonry which a common university education

creates between persons who otherwise have their position at very different points of the social scale. We believe it will be found that few men have so little reason to repent their choice of a profession as the graduates of the universities at present on the roll of attorneys; but their number, though not inconsiderable, admits of much augmentation."

Another publication—the *Law Review*—has spoken out in much the same manner. "The transition from law costs to attorneys is natural and easy; and accordingly Mr. Joshua Williams devotes his second letter to the consideration of the present state and condition of this branch of the legal profession. An university education is recommended as the principal cure for the evils which the public suffer at the hands of unprincipled attorneys. However this may be, we have frequently felt surprise that so few men who have received an university education should resort to what is commonly called the inferior branch of the profession of the law. Why such a continual rush to the already overcrowded ranks of the bar? The prizes to be obtained there are indeed great and glittering; but what a distressing number of blanks! Wherever men of university *talent* have fairly entered the field, they have, as a general rule, achieved success. The army and navy, from peculiar reasons having reference to age, are, practically speaking, closed against them; and the medical profession, for some cause or other, has never become popular with university men. In the Church, however, they reign supreme; and few at the bar, in the senate, or in diplomacy achieve any great success without having at some one of the universities laid the broad basis of a superior education. The East India civil appointments, also, now recently thrown open, have hitherto been, and will probably continue to be, nearly all obtained by university men. We have refrained, from a proper feeling of modesty, from alluding to the fourth estate of the realm—the press, which may be said to be monopolised by men educated at our universities. Want of capital in some cases, and in others a foolish feeling of prejudice, alone prevents such men from engaging in trade, and becoming numbered among the merchant princes of the land. Why should not, then, our wranglers and class-men enter the lists of the attorneys and solicitors? In order to afford every encouragement to them to do so, the period of articles in their case is reduced from five years to three years. At the end of that time an income of £100 or £150 a year may with certainty be procured without any extra outlay; and, in addition to the ordinary chances of success, should, as is sometimes the case, professional advancement concur with domestic arrangements, a settlement in life may be acquired at a much

earlier period than in any other profession. To enjoy, also, the regard, esteem, and confidence of a large circle of clients, is of itself a reward of no small importance. In the church of St. Dunstan's-in-the-West will be found a monument erected by the clients of a deceased solicitor to his memory, recording, in quaint certainly, but most endearing terms, their testimony of his integrity and kindness in the transaction of their affairs throughout a long professional career. Such a record of private worth is, to our mind, more valuable than many higher objects of human ambition.

COURSES OF LAW STUDIES.

(Continued from p. 221).

We have before referred to the unsatisfactory statement in Blackstone's Commentaries as to the distinction between the operation of a fine and a recovery levied or suffered by a tenant in tail having the immediate reversion in himself, and as to the necessity of a recovery of an estate tail being with double voucher (*ante*, p. 217); as fines and recoveries are abolished, some of our readers may think it unnecessary to notice the subjects, but we conceive that no intelligent lawyer should be without a knowledge of them, sufficient at least to enable him to understand text-books on those branches of the law, and more particularly as abstracts of title are often carried back to the times when fines and recoveries were in vogue. Besides which the old law sheds a light on the new, and explains many things which are otherwise incomprehensible.

OF THE DISTINCTION BETWEEN THE OPERATION OF A FINE AND THAT OF A RECOVERY, WHERE THE TENANT IN TAIL HAS THE REVERSION, AND THERE ARE NO INTERMEDIATE REMAINDERS.

The uses of fines prior to their abolition were, first, to extinguish dormant titles, which were barred after five years' non-claim by the statutes 18 Ed. 1 and 4 Hen. 7. c. 24. Or, secondly, to bar the issue in tail, under the statutes 4 Hen. 7. c. 24, and 32 Hen. 8. c. 36. Or, thirdly, to pass the estates of *femes covert* in the inheritance or freehold of lands and tenements. In the last instance, the fine is supposed, by Blackstone, to be binding upon the *feme covert* because she was privately examined as to her voluntary consent (2 Bl. Com. 352). But, if that were indeed the principal reason, any other mode of conveyance, to which the same form of private examination was superadded, would have been as binding as a fine. It seems, that the fine was binding in such case, "because it was the conclusion of a real action commenced by original writ,"

without which preliminary, a fine would have been a nullity. In the ancient practice, the recovery of the estate of the wife, in a real action, was held to be binding, notwithstanding the coverture. Upon the same principle, the fine was held to be binding, because of the supposed depending of a real action, of which the fine was an amicable composition by agreement; and not because of the form of private examination, which was only a circumstance in the mode of levying the fine, and a merely secondary incident introduced to prevent compulsion. And although fines and recoveries were in later times no more than feigned proceedings, or, as they were usually called, common assurances, yet, in point of bar and conclusion, they were governed by the same principles as if they were really adverse suits (see the note 171, Co. Litt. 121 a.; Litt. s. 670, 672). The 3 & 4 Will. 4. c. 74, makes the separate examination an essential; and hence the case of Banks v. Ollerton (23 L. J. Ex. 285), where the terms of the act had not been complied with.

The operation of a fine levied by a tenant in tail where he had the reversion in himself, and there were no intermediate remainders, was to bring the reversion into possession; but if he suffered a recovery in the like case, it operated to defeat the reversion. As for example: B. was tenant in tail by descent, with reversion to himself in fee, of certain lands, of which A. (his ancestor) had granted leases with covenants for further renewal. Now, in the first place, although the tenant in tail was empowered under the enabling statute (32 Hen. 8. c. 28, since repealed as to tenants in tail, 3 Law Chron. 110) to grant leases for twenty-one years, or three lives, pursuant to the directions of the statute, he had plainly no power, either by the statute or by the common law, to bind the issue in tail to a further renewal, and, consequently, whatever covenants A. might have made to that effect, they could not be binding upon the heir in respect of the estate tail. The reason is, that the heir in tail, although he comes to the estate tail by descent, yet takes as a purchaser, "*per formam doni*," and, consequently, is not chargeable, except by statutory provision with the incumbrances of his ancestor, as when he takes by descent at the common law. Secondly, with respect to the reversion in fee, which also descended at the same time from A. to B., this was "*hereditas infructuosa*," as long as the estate tail subsisted; and although the covenants of the ancestor are said to descend as an *onus* upon the heir, whether he inherits any estate or not, yet they lie dormant, and are not compulsory until he has assets by descent from or through that same ancestor. But a reversion, or a remainder expectant upon an estate tail, was not assets, because it was

always in the power of the tenant in tail in possession, to bar it at his pleasure, the power of alienation by fine and recovery being an inseparable incident to an estate tail (see Co. 224 a. and note 132). Let us then suppose, that, under these circumstances, B. levied a fine with proclamations, under the statute 4 Hen. 7, c. 24, and 32 Hen. 8, c. 36 (which is said to be the mode usually resorted to in such cases where there were no intervening remainders), for the sake of quieting the possession, or in order to prepare for making a new settlement. Now, by the operation of the fine, in the first instance, the counsee took a fee simple qualified, determinable upon the death and failure of issue of the tenant in tail, and which was afterwards reconveyed by the deed to lead the uses of the fine to B. himself, who, consequently, became tenant of the fee simple qualified, together with the old reversion to himself in fee simple absolute. But it is a maxim of law, that where two estates in succession are vested in the same person, the less estate always merges in the greater (see better, 2 Law Chron. 252—256; First Book, 152); and though an estate tail does not merge because of the statute *de donis*, which would otherwise be of no effect, there is no such exception with respect to the qualified or base fee extracted out of the estate tail, and which therefore instantly merged in the old reversion in fee simple; and, consequently, the *hereditas infructuosa* being reduced into possession, the heir had assets by descent, from the same ancestor who entered into the covenants, and was of course bound by those covenants. And so it was adjudged in the case of *Kellow v. Rawden*: the reversion in fee, expectant upon an estate tail in possession, was not assets; but no sooner was the estate tail become extinct, and the reversion vested in possession in the heir, by the operation of the fine, than it thereupon became assets, and liable to all the incumbrances of the ancestor (*Simpson v. Simpson*, 4 Bing. N. C. 383; 1 Real Prop. Rep. 28).

We have here, then, the principle upon which the fine operated to let the reversion into possession, and to make the heir chargeable in such case, in respect of assets descended, who was not so before. But, in the case of a recovery, it was otherwise. Why? Because the estate conveyed by the recovery was that of fee simple absolute (First Book, 183, 184), of which the recoveror acquired seisin, not by compromise, as in the case of a fine, but by adjudication of an adverse possession grounded upon an older and better title; and, consequently, the operation of the recovery was to defeat the reversion, together with all the mesne estates and incumbrances, precisely in the same manner as if the recoveror had actually recovered in a really adverse

suit. And now by the 3 & 4 Will. 4, c. 74, base fees when united with the immediate reversions are enlarged instead of being merged; so that where A., tenant in tail, whether in possession or not, with remainder or reversion to B. in fee, there being a protector of the settlement, makes an assurance under the act, which by reason of the non-consent of the protector is insufficient to bar the remainder or reversion, such assurance bars the issue in tail, and gives a fee *determinable* on failure of such issue, but does not divest or displace the remainder or reversion; which therefore continues to subsist as an *estate* expectant on the determinable fee. If, by any means, the remainder or reversion of B. becomes afterwards vested in A., the determinable fee does *not* merge in the remainder or reversion, as upon ordinary principles it would do, but by sec. 39 of the act, is *ipso facto* enlarged; and A. has thenceforth a clear fee simple founded, in point of title, upon the estate tail. The 39th sec. enacts "that if a base fee in any lands, and the remainder or reversion in fee in the same lands shall, at the time of the passing of this act, or at any time afterwards, be united in the same person, and at any time after the passing of this act there shall be no intermediate estate between the base fee and the remainder or reversion, then and in such case the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as the tenant in tail, with the consent of the protector, if any, might have created by any disposition under this act if such remainder or reversion had been vested in any other person."

OF THE DISTINCTION BETWEEN SINGLE AND DOUBLE VOUCHER.

In the case of a recovery with single voucher, supposing the præcipe upon which the recovery was grounded to have been brought immediately against the tenant in tail himself, who appeared and vouched over the common vouchee to warranty, it was then the estate tail of which he was actually seised at the time which was defeated, and, consequently, remainders and reversions, together with all latent droits and interests, were not barred. Secondly, if the tenant in tail levied a fine, as he usually did, preparatory to the recovery, now the estate tail being thus divested by the operation of the fine, the recovery which was had thereon was no longer of the old fee tail, but of the new fee simple, which had been extracted out of it. In this case, however, as well as in the former, a sufficient recovery could not be had with single voucher, but only with double voucher at least, though not exactly for the same reason; for in the former case, in which the recoveree or tenant to the præcipe was actually seised, at the time of an estate tail, the recovery was

necessarily of that estate and of nothing more; but in the latter case, in which the estate tail was previously divested or discontinued by the fine, and turned to a droit, the recoverer or tenant to the præcipe had fee simple, the recovery of which was good against him by way of estoppel; but, upon his death, might be avoided by the issue, by defeating the discontinuance under which it was created. As for example; when the tenant in tail levied a fine, it operated in the first instance as a discontinuance. It may be here remarked that a fine at the common law, or without proclamations, ensured as a feoffment upon record, of which it was virtually the acknowledgment. It was only in the special case of a fine being levied with proclamations, under the stat. 4 Hen. 7, c. 24, and 32 Hen. 8, c. 36, that the issue in tail was barred by force of those statutes (Co. Litt. 262 a.; *Ibid.* 372 a.; and see the note 171 to Co. Litt. 121 a.). Suppose, then, the estate created under the discontinuance to have been immediately reconveyed to the tenant in tail himself, who thereupon suffered a recovery. Now it is clear, that this recovery was not of the estate tail, but of the estate created under the discontinuance. By the same rule, then, if the heir in tail defeated the discontinuance (which he might well have done by action, though not by entry), the discontinuance being defeated, the tortious fee simple, which the discontinuance gave rise to, was necessarily determined, and, consequently, the recovery avoided. But where the tenant in tail was brought in as vouchee to the warranty, as in the case of a recovery with double voucher, the heir was then barred by the warranty, and so were all they in remainder or reversion. For the law always supposed, upon a principal of equity, that the first vouchee recovered other lands of equal value against the second vouchee, which descended in the same course of inheritance as the estate passed by the recovery would have descended. Upon this presumption of law, which was uniformly admitted in order to give effect to common recoveries, the warranty of the ancestor not only bound the heir, and barred every latent right and interest he might have had in the lands recovered, but also defeated at the same time the remainders over. But where the ancestor had entered into no such warranty (with double voucher), there was evidently no bar to the heir, so as to preclude him from his latent droit in tail, which was above the recovery. And so in all cases, where there were several and distinct estates above the estate passed by the recovery, it was necessary that the parties should be all severally vouched to warranty in order to insure a good title.

Contingent remainders, and executory devises.—Having thus illustrated the remarks before made as

to some of the defects of Blackstone's Commentaries, we have further to observe that in the same manner, again, in distinguishing between contingent remainders and executory devises, he omits to point out that which is the principal and essential difference—namely, that “the former may be barred and destroyed, or prevented from taking effect, by several different means, while an executory devise, on the contrary, cannot be prevented or destroyed by any alteration whatsoever in the estate out of which, or after which, it is limited. And upon this ground it is that executory devises are required to be limited so as not to exceed the stated time of lives in being and twenty-one years (First Book, 152); but not so contingent remainders, because, in the latter case, there is no danger of a perpetuity. Indeed, from the very terms in which an executory devise is afterwards exemplified, we are naturally led to confound executory devises with contingent remainders, and contingent remainders with conditional limitations. I allude to the words where a deviser *devises his whole estate in fee, but limits a remainder thereon to commence*, &c. (2 Bl. Com. 173); for in this case the entire fee, or whole quantity of the estate, having been originally disposed of, there was evidently no longer any residuary part, or remainder over, for further disposal, but only a secondary or springing use (Ferne, Cont. Rem. 419, last edition). Wherever a preceding executory limitation carries the whole interest, a subsequent limitation is not to be considered as a limitation upon the preceding, and to take effect after it, but as an alternative substituted in its room, and only to take effect in case the preceding estate should fail, or never take effect at all (1b. p. 522). It follows that the subsequent limitation, in the present instance, is no remainder, but only a concurrent possibility, which was not barrable by fine or recovery. [By the 8 & 9 Vic. c. 106, possibilities, coupled with an interest in real estate, may be disposed of by deed]. But if the subsequent limitation had been after a preceding estate tail, instead of a preceding fee simple, it would have been otherwise, for then it would have been rightly named “a remainder.”

Secondly, it is the quality of a remainder to wait the expiration of the preceding estate, and then to vest in possession, as the corresponding part or portion of the same fee; but here, on the contrary, the estate which was limited in contingency to B. and his heirs, was limited so as to vest in possession, in extinction, and defeasance of the preceding estate, and, consequently, is not a remainder.

OF THE DISTINCTION BETWEEN CONTINGENT REMAINDER AND CONDITIONAL LIMITATION (see the note 94 to Co. Litt. 208 b.).

The distinction between a contingent remainder

and a conditional limitation is simply this—viz., that the former waits the regular expiration of the preceding estate, and then vests in possession as the corresponding part or portion of the same fee; but the latter vests in possession, in extinction, or defeasance of the preceding estate, and before the period originally marked out for the expiration of the same. Thus, if lands are limited to A. for the life of B., or so long as B. shall live, and in the event of B.'s death in the lifetime of A., then to C. in fee. Now, in this case, C. has a contingent remainder. But if the limitation were to A. for life, or which, in effect, is the same thing, to A. generally, provided, nevertheless, that in the event of B.'s death in the lifetime of A., that then the land shall go over to C. in fee, this is no longer a contingent remainder to C., but a conditional limitation. Why? Because, in the first case, in which the preceding estate was originally limited to A. for the life of B. and no longer, the remainder, which was limited in contingency to C. in fee, must necessarily wait the regular expiration of the preceding estate, out of which, or after which, it was limited. But here, on the contrary, the qualifying or determining expressions, forming no part of the original limitation, but being annexed thereto in the nature of a collateral or distinct *proviso*, and by which the preceding estate is to be abridged, defeated, or nullified, it is evident that the estate, which is limited in contingency to C. in fee, may vest in possession before the period originally marked out for the expiration of the preceding estate; and, consequently, such limitation over is not a contingent remainder, but a distinct conditional limitation. The reason that every "remainder" must be so limited as to wait for the determination of the particular estate before it takes effect in possession, and cannot take effect in prejudice or exclusion of the preceding estate, is, that if such remainder should be good, then would it give an entry to him who had no right before, which would be against the express rule of law, "that an entry cannot be given to a stranger" (see the Commentary on Richel's case, in the chapter upon Warranties, Co Litt. 377 b. *et seq.*)

Contingencies and possibilities, assigning.—Again we, in the Commentaries, read that "contingencies and mere possibilities, though they may be released and devised by will, or may pass to the heir or executor, yet cannot (it has been said) be assigned to a stranger, unless coupled with some present interest" (2 B. C. 290). But, independently of thus confounding contingencies and mere possibilities as if they were in *pari ratione*, which they certainly are not, there is here a great mistake; first, in describing mere possibilities to be such as may be released or devised by will, &c.; and, secondly, in supposing

devisable possibilities to be incapable of being assigned to a stranger. For, in the first place, there is this wide difference between contingencies (which import a present interest of which the future enjoyment is contingent) and mere possibilities (which import no such present interest)—namely, that the former may be released in certain cases, and are generally descendible and devisable: but not so the latter [see now the 8 & 9 Vic. c. 106, s. 6]. Suppose, for instance, lands are limited (by executory devise) to A. in fee, but if A. should die before the age of twenty-one, then to C. in fee; this is a kind of possibility or contingency which may be released or devised, or may pass to the heir or executor, because there is a *present interest*, although the enjoyment of it is future and contingent. But where there is no such present interest, as the hope of succession which the heir has from his ancestor in general, this being but a *mere* or *naked* possibility, cannot be released or devised, &c. [As to wills, see 1 Vic. c. 26, s. 3; also as to s. 33, that a person may dispose, by will, of property bequeathed to him by his father, &c., although he should die in the father's lifetime; see Johnson v. Johnson, 13 Law Journ. Ch. 79; 8 Jur. 77. The 8 & 9 Vic. c. 106, does not extend to the hope of succession of an heir or next of kin.]

Assignment of contingencies and possibilities in equity.—Secondly, contingencies or possibilities, which may be released or devised, &c., are also assignable in equity upon the same principle; for an assignment operates by way of agreement or contract, which the court considers as the engagement of the one to transfer and make good a right and interest to the other. As where A., possessed of a term of 1,000 years, devised it to B. for fifty years, if *she should so long live*, and after her decease to C., and died; and afterwards C. assigned to D. Now this was a good assignment, although the assignment of a possibility to a stranger. The same point was determined in the case of Theobald v. Duffay, in the House of Lords, March, 1729, 1730.

Debt for freehold rent.—Again, before the statutes 8 Ann. c. 14, and 5 Geo. 3, c. 17, no action of debt was maintainable for the recovery of a freehold rent till after the lives ended; for which Blackstone assigns the following reason—namely, that "the law would not suffer a real injury to be remedied by an action that was merely personal" (3 Bl. Com. 232). But how comes it then that the action of debt was maintainable after the lives ended? The determination of the lives could not alter the nature of the injury. Under the feudal system all lands, tenements, rents, commons, and hereditaments, in fee simple, fee tail, or for term of life, were held to be feudal property, and were consequently required to be recovered as

such by their proper feudal remedies. Our old law books call them, indifferently, feudal or real property, and feudal or real actions; personal actions, which were not introduced till long afterwards, being only resorted to for the recovery of commercial, in contradistinction to feudal property, such as matters of mere contract, and things which were suffered to enure as such. It followed that no action of debt could be brought at the common law for the recovery of a freehold rent till after the lives ended, or, in other words, as long as there was a continuing relation of lord and tenant. It was not because of the real nature of the injury (which necessarily remained the same), but because of the *feudal quality of the freehold*, or continuing relation of lord and tenant; but otherwise it was *after the lives ended*, because the feudal relation was then become extinct; and, therefore, the rent arrear was suffered to enure as a debt incurred, and to be recovered, like any other debt, by a personal action, as a matter of mere contract between the parties. Before the statute 8 Ann. c. 14, if A. had leased to B. for life, reserving a rent, he could not, by the common law, bring an action of debt for *this rent*. Why? Because he had an estate of freehold in the rent—viz., during the life of B.—and he could not assert his right to the arrears without asserting his right to the *estate*; and this he could not do in an action of so low a nature as an action of debt. By the same rule, again, if A. had granted a rent-*seck* to B. for life, although, by the common law, B. could not distrain, nor (if he had no seisin) bring an assise, yet the law would rather leave him without remedy than suffer him to assert his right to an estate of freehold in an action of debt. But, upon the death of B. (the grantee), his executor might recover the arrears by action of debt, *causâ quâ suprâ*. And so in the other case, where A. leased to B. for life, A. might recover the arrears, by action of debt, upon the death of B.; for, in both these cases, the *estate of freehold* in the rent was determined.

Defeasance of feoffment—Executed and executory.—Again a defeasance of a feoffment, if made subsequently, is void; for which Blackstone assigns this reason—"that no subsequent secret revocation of a solemn conveyance, executed with livery of seisin, was allowed in those days of simplicity and truth" (2 Bl. Com. 327). But, according to this mode of reasoning, there should be no after-made defeasance allowed of a recognisance, or of a judgment, or of any other executory conveyance of record, which are all equally solemn with a feoffment. Lord Coke expressly tells us that there can be no after-made defeasance of a feoffment, because it is an *executed* conveyance in contradistinction to those which are executory (Co. Litt. 204 a.). In the case of a feoffment, the estate

in the land is finally vested or executed in the feoffee, by the act of livery of seisin, at the instant it is made; and, consequently, the feoffor can no otherwise have the land again, than by a *reconveyance de novo*. *Quod semel factum est, non potest infectum reddi*. But otherwise it is, in the case of statutes, recognisances, obligations, judgments, and the like; for these are but *executory*, that is to say, they remain to be completed by a further act still to be done—viz., the process of execution; and, consequently, till that is had, they may, of course, be defeated or discharged at any time. And so it is of all other matters which are in their nature executory, such as rents, annuities, conditions, warranties, and so forth (Co. Litt. 236 b.). The distinction between executory and executed conveyances is a doctrine of very extensive application, and is highly important to be attended to in the construction, not only of legal, but also of equitable or trust estates. Thus, in the case of articles, or a will directing a conveyance, &c., the Court of Chancery will order the conveyance to be made in such manner as may best answer the intention of the parties, for these matters are purely executory in prospect of the assurances to be made afterwards, and because the completion of them is referred to a *future conveyance or settlement*, in contradistinction to those trusts in which no such executory medium is referred to, and which are, consequently, not equally open to the construction of a court of equity upon the circumstances of intention.

SUMMARY OF DECISIONS.

EQUITY AND CONVEYANCING.

ADMINISTRATION.—*Unsatisfied covenants—Liability of executor—Legatees refunding—Setting apart a portion of assets.*—The old rule of courts of equity was to pay legacies only upon the bond of the legatee to repay the amount, if debts should appear afterwards. But that practice has been done away; the security of the creditor has certainly been diminished in consequence, but still he has his remedy by following the fund. Under the present practice of the court a creditor is excluded if he does not come in under the advertisement (though still he has his remedy against the estate). Lord Cottenham, in *Knatchbull v. Fearnhead* (3 Myl. and Cr. 126), said that, "when an executor passes his accounts in a court of equity he is discharged from further liability, and the creditor is left to his remedy against the legatees; but if he pays away the residue without passing his accounts, he does it at his own risk." Sir J. Wigam, in *Fletcher v. Stevenson* (3 Hare, 360; 13 Law Journ. Ch. 202; 8 Jur. 307), expressed the same opinion as to the

exemption of the executor from liability, when acting under the direction of the court, although under the special circumstances of the case, for the protection of the covenantee, he refused to order payment of the interest of a fund in court to the legatee for life; and in *Simmons v. Bolland* (3 Mer. 547), where Sir W. Grant refused to order payment of the interest of a fund in court to a party entitled, observing that no decree that he could make would bind the covenantees or protect the executors against their demand, was not opposed to the principle he had laid down: that was not an administration suit, which made a material distinction. He admitted that a decree taken incidentally in a suit would not bind a creditor; it must be a decree made in an administration suit. Accordingly, in the following case, it was held that in an administration suit, if the executor brings fully before the notice of the court all covenants entered into by his testators remaining unsatisfied, he is personally exempt from all liability in respect of future breaches, and that it is unnecessary to set apart any part of the estate for his indemnity, and, consequently, that the estate may be distributed, the future creditor being left to his remedy against the legatee. *Waller v. Barrett*, 30 Law Tim. Rep. 216.

BUILDING SOCIETY [vol. 3, p. 395].—*Mortgage by borrowing member—Bonus—Costs.*—The case of *Fleming v. Self* (3 De Gex M. and G. 997) was followed by Vice-Chancellor Stuart, in the case presently mentioned (see also *Archer v. Harrison*, 29 Law Tim. Rep. 71; 3 Law Chron. 395). It appeared that the plaintiff held four shares in a building society, and on the 30th of June, 1840, he became a borrowing member. In July, 1855, a bonus was declared. Before June, 1856, plaintiff gave notice of his intention to redeem. In July, 1856, meetings were held, the plaintiff being present, at which redemption of the shares was proposed upon certain terms. Some members with whom the plaintiff had consulted, applied to redeem, and afterwards did redeem on the terms suggested at these meetings. Plaintiff, however, did not adopt these terms, but stood upon his previous rights. The defendants (the trustees) contended that the plaintiff was precluded from redeeming, except upon the terms proposed at the meetings, and granted to the members who had retired: Held, that the plaintiff was not bound by the terms subsequently granted to the retiring members; that there was no new agreement; and that he was entitled to the relief prayed. No order as to costs, but £25 allowed to each party out of the funds of the society. *Smith v. Pilkington*, 30 Law Tim. Rep. 196.

DEBTOR AND CREDITOR.—*Trust deed—Judgment creditors—Subsequent execution—Discretion*

[vol. 1, p. xx.].—In the case of trust deeds for the benefit of creditors, there is, irrespective of special circumstances, a certain time limited within which creditors may come in to execute them; and any one who does not execute within that time is excluded from the benefit of the trusts, unless the trustees think fit to allow him to come in at any subsequent time. There is, therefore, irrespective of any equity, a discretion in the trustees, notwithstanding the expiration of the period originally fixed, to allow any creditor to come in at any time after that period. In the following case, it appeared that a trust deed was framed for the benefit of creditors, and a time was fixed within which a creditor must execute or be excluded, but an absolute discretion was given to the trustees. A judgment creditor refused for twenty-two years to execute by reason of his paramount claim: but the judgment turning out to be invalid, and a suit having in the meantime been instituted for carrying into effect the trusts of the deed, he petitioned in the suit to be allowed to come in, being willing to execute on the ground of the invalidity of the judgment being only now discovered, although he had never applied to the trustees. Petition refused with costs. *Brandling v. Plummer*, 6 Week. Rep. 117.

JUDGMENT CREDITOR.—*Deed of arrangement—Bankrupt Law Consolidation Act, secs. 211, 218—Relution.*—By the 27th section of the Bankrupt Law Consolidation Act, 12 & 13 Vic. c. 106, any registrar of the court is empowered to act for, and as the deputy of any commissioner, and to have and exercise all powers vested in the court, except the power of commitment, the hearing of any disputed adjudication, or respecting the allowance or suspension of any bankrupt's certificate; but by the 44th order of the 19th Oct., 1852, except in cases of emergency, no registrar is to sit or act for any commissioner without the express request in writing of such or any other commissioner. A. filed a petition for a private arrangement with his creditors on 21st May, 1855, and by an order of the commissioner for the district made on the same day protection was granted until the 18th June then next. On the 2nd June, 1855, the registrar of the court made another order, purporting to grant protection from process to the person and property of A. until the 9th June then next. This order for protection purported to be under a petition by A., presented on the 1st June. No petition, however, was presented by A. on the 1st June; but the petition of the 21st May appeared to have been, on that day, allowed to be refiled, and was indorsed accordingly. On the 5th June, 1855, the plaintiff recovered and entered up judgment against A. for a debt and costs. In August, 1855, A., by deed, assigned certain specified lands and

property to trustees, for the benefit of certain creditors therein mentioned, among whom the plaintiff was included by name, but the plaintiff never executed the deed. The plaintiff now prayed for a declaration that his judgment was binding on the lands comprised in the deed: Held, that the plaintiff was entitled to the relief prayed. A proposal for an arrangement by a debtor under the Bankrupt Act must be regularly carried out, whereas the two orders in this case were inconsistent, and the second order irregular in the highest degree; nor did the deed purport to convey all the property of the debtor, nor to be in trust for all the creditors: Held, further, though unnecessary for the decision of the present case, that upon the construction of sec. 218 of the Bankrupt Act, the execution of a deed of arrangement does not relate back to the date of filing the petition, or of the order of protection, but takes effect from the approval of the whole transaction by the commissioner. *Southern v. Sidney*, 30 Law Tim. Rep. 182.

LEASES AND SALES OF SETTLED ESTATES ACT [*ante*, p. 48].—*Consent of incumbents*.—If upon a petition presented under the 19 & 20 Vic. c. 120, it is very difficult or impossible to obtain the consent of all the parties interested, the court will, under the 18th section, make an order in the absence of those parties, expressing in the order that it is subject to, and so as not to affect their rights. *Re Legge*, 6 Week. Rep. 20.

LUNACY.—*Partition—Jurisdiction—Trustee Act, 1850—Lunacy Regulation Act, 1853.*—The 3rd section of the Trustee Act, 1850, enacts "that when any lunatic or person of unsound mind shall be seised or possessed of any lands upon trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted by virtue of the Queen's sign manual, with the care of the persons and estates of lunatics, to make an order that such lands be vested in such persons and in such manner and for such estate as he shall direct." By the 30th section of the same act it is enacted "that where any decree shall be made by any court of equity for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally where any such decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said court to declare that any of the parties to the said suit wherein such decree is made are trustees of such land or any part thereof within the meaning of this act." The 124th section of the Lunacy Regulation Act (the 16 & 17 Vic. c. 70), enacts as follows:—"Where a lunatic is seised of or entitled to an undivided share of land and it appears to the Lord Chancellor intrusted as

aforsaid to be for his benefit, and to be expedient that a sale of the land or part thereof, or a partition of the land, should be made; and where a lunatic is seised or entitled to land, and it appears to the Lord Chancellor intrusted as aforsaid to be for his benefit, and to be expedient that an exchange thereof or part thereof for other land should be made—the committee of the estate, in the name and on the behalf of the lunatic, under an order of the Lord Chancellor, intrusted as aforsaid, may concur with such other person in making such sale or partition, or may make such exchange and receive such monies for equality, partition, or exchange, or otherwise in relation thereto, as the owner may direct." In the following case, a bill for partition was filed against a lunatic tenant in tail of an undivided share of certain lands, and she appeared as a defendant by her committee. The Vice-Chancellor decreed a partition, and made an order in accordance with the Trustee Act, 1850, declaring the lunatic a trustee of certain of the hereditaments. The Lords Justices made an order in the lunacy and under the Trustee Act, directing the decree of the Vice-Chancellor to be carried into effect, and a conveyance to be executed by the committee. Whether the decree could have been carried into effect under the Trustee Act alone—*quære*. *Re Bloomar*, 6 Week. Rep. 178.

MARRIAGE [*ante*, p. 244].—*Deceased wife's sister—International law—Comitas gentium*—5 & 6 Will. 4, c. 54.—By the 5 & 6 Will. 4, c. 54, s. 2, it is enacted "that all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever." This is the act under which the marriage of a man with the sister of his deceased wife is prohibited, and on which the question has been raised, whether it extends to such a marriage celebrated in a country where such marriages are legal. B., by his first wife C., who died in 1847, had one son and one daughter. In 1851 he, being then a domiciled English subject, intermarried in Denmark with E., the sister of his deceased wife (such marriage being valid according to the *lex loci contractus*), by whom he had one son and two daughters. By his will dated in 1855, he gave all his real and personal estate among the children of his two marriages in certain proportions. Both B. and E. died in 1855, and the son of their marriage in 1857. Upon the question as to whether the share of the latter in B.'s estate went as to the realty, to B.'s son by his first marriage, and as to the personalty among all B.'s children equally, or whether such share, both of realty and personalty, passed to the Crown by reason of the invalidity of B.'s second marriage, and

consequent illegitimacy of the issue: Held, per Cresswell, J., sitting with Stuart, V. C. (the Vice-Chancellor reserving his judgment) that the second marriage was invalid, and the issue consequently illegitimate. *Brook v. Brook*, 6 Week. Rep. 110; ante, p. 244.

MORTGAGE.—*Priority—Negligence—Possession of title-deeds*—13 Eliz. c. 5.—A person taking a legal mortgage without the title-deeds, is not thereby postponed to a subsequent mortgagee without notice, but with the deeds, unless the first mortgagee has been guilty of fraud or gross negligence. But if the deeds were left with the mortgagor to enable him to raise another sum to take precedence of the mortgage debt of the party so leaving them, he will be postponed to any subsequent mortgagee, even though his mortgage may not have been within the understanding between him and the mortgagor. *Perry v. Atwood*, 6 Week. Rep. 204.

PARTNERSHIP.—*Receiver and manager—Coal mines—Contribution of capital.*—The court will not in general appoint a receiver or manager of a partnership at the instance of some only of the partners in a suit in which a dissolution is not prayed; but it is otherwise where a dissolution is asked for by the bill. By the deed of partnership of a colliery it was amongst other things provided, that if additional capital should be required to carry on the works, it should be contributed in proportion to the shares which each partner had in the partnership. The working of the mine had been unsuccessful, and it required further capital to carry on the works. A notice to the bankers had been given by one of the partners, that he should not hold himself liable for any further advances to be made by them on account of the partnership, and he refused to contribute any further capital stipulated by the copartnership deed. On bill filed by some of the other partners praying for the usual account to be taken, and for a receiver and manager to conduct the concerns of the partnership, and for a dissolution if necessary: Held, on motion, that the plaintiffs were entitled to a receiver and manager until the hearing. *Marsden v. Kaye*, 30 Law Tim. 197.

TRUST.—*Breach of trust—Costs of trustee—Specialty debt*—19 & 20 Vic. c. 97, s. 5.—It is generally true that where a trustee executes the trust deed, and afterwards commits a breach of trust, such breach of trust gives rise to a specialty debt. With regard to the rights of a surety, the law laid down in *Copis v. Middleton* (Turn. and R. 224; 8. C. 2 Law Journ. Ch. 82) is repealed by the 19 & 20 Vic. c. 97, s. 5, which makes a surety who discharges the liability entitled to the assignment of all the securities held by the creditor. A. and B. were trustees of a settlement, and a breach of trust was

committed, B. being the guilty party. The trust fund was ultimately restored, and A.'s costs were directed to be paid out of B.'s estate: Held, that these costs were not a specialty debt as against B.'s estate. A. paid the sum on account of his costs, after the passing of the 19 & 20 Vic. c. 97, and it was held that the sum was paid in the character of surety, and therefore that, under the 5th. section of that act, he was entitled to claim as a specialty creditor on account of it. *Lockhart v. Reilly*, 27 Law Journ. Ch. 54.

TRUSTEE.—*Negligence—Trustee made personally liable for neglect to comply with order of court—Failure of banker.*—Where a trustee, after he had been discharged from his trusteeship by a decree of the court, and after new trustees had been appointed, and he had been ordered to pay over the balance of the trust moneys then in his hands to the new trustees, subject to his retaining thereout his costs when taxed, kept the trust moneys at his own bank for some time after the costs had been taxed and ascertained, and the bank failed—the trustee was held personally liable to make good the loss which had accrued to the trust estate by reason of the failure of the bank. *Lunham v. Blundell*, 6 Week. Rep. 49.

EQUITY PRACTICE.

ANSWER.—*Attachment for want of answer—Service of interrogatories—Evidence.*—An indorsed memorandum of service in the handwriting of a clerk of the plaintiff's attorney (the writer being abroad), coupled with an affidavit by another clerk that the defendant's solicitor had admitted to him verbally the service of interrogatories: Held, sufficient to justify the court in ordering an attachment to issue against the defendant for want of answer. *Sidebottom v. Adkins*, 6 Week. Rep. 97.

DISMISSING BILL.—*Motion to dismiss—Injunction—Order to stand over.*—A motion for an injunction had been ordered, on the last day of July, 1856, to stand over, with liberty to take proceedings at law. In August the plaintiffs brought their action. On the 8th October the defendant's answer was put in. The plaintiffs had taken no step since. On motion, pursuant to notice in August, the court dismissed the bill with costs, notwithstanding the order to stand over. *Baker v. McClellan*, 30 Law Tim. Rep. 230.

ISSUE.—*Neglect to try—Creditors' suit—Substitution of other creditors as plaintiffs.*—In a creditors' suit, leave was given to the plaintiff to try an issue as to the sanity of the debtor at a particular time. The plaintiff subsequently declined to try the issue, and upon the application of other creditors they were permitted to be substituted for him, upon

giving security for the costs of the trial. *Elliott v. Ince*, 27 Law Journ. Ch. 51.

PARTIES TO SUITS.—*Cost-book mining company—Simple partnership—All partners necessary parties to suit.*—Where one shareholder of an incorporated company files a bill calling upon a court of equity to decide, as between him and his co-partners, what is his liability as partner, as this involves the taking of the accounts of the partnership, all the partners, however numerous, must be made parties to the suit. A shareholder in a cost-book mining company filed his bill against the managing committee, and against a creditor of the company, to restrain an action at law brought against him by the creditor at the instigation of the managing committee. The bill also asked for an account as to the amount of the plaintiff's liability to the company. The Court of Chancery granted an injunction to restrain the action by the creditor, but dismissed the bill as against the managing committee, on the ground that, as the company was a simple partnership, formed under no act of Parliament, it was necessary, in order to have an account, that all the members should be made parties to the bill. *Sibley v. Minton*, 27 Law Journ. Ch. 53.

PARTIES TO SUIT.—*Trustees—Hearing of cause in absence of—Trustee Act, 1850, s. 49—Absent trustee.*—By the 13 & 14 Vic. c. 60, where in any suit it is made to appear to the court by affidavit that a defendant being a trustee cannot be found to be served with process, a decree may be made in the same manner as if the trustee had been served with process, and had appeared and filed his answer, and had also appeared by counsel at the hearing. In the following case, the court directed a cause to be certified as fit for hearing, although one of the defendants, a trustee, who could not be found, had not entered an appearance. *Westhead v. Sale*, 6 Week. Rep. 52.

PRODUCTION OF DOCUMENTS.—*Partnership—Scheduled documents—Relating exclusively to defendant's title.*—Where a defendant schedules certain documents to his answer, but refuses to produce them, on the ground that they relate exclusively to his title, do not support the plaintiff's case, nor tend to defeat his own; if the documents may be important in determining the question at issue in the suit, they must be produced. *Greenwood v. Greenwood*, 6 Week. Rep. 119.

REVIVOR [vol. 2, p. 300].—*Order to revive*—15 & 16 Vic. c. 86. s. 52.—By the 15 & 16 Vic. c. 86, s. 52, in the event of the abatement of a suit, an order of course to revive may be obtained, and is to have the same effect as a bill of revivor would have had. However, in the following case it was held that, where it would have been necessary under the

old practice to have filed a supplemental bill in the nature of an original bill, a mere order to revive, under the above provision of the 15 & 16 Vic. c. 86, s. 52, is not sufficient, but a bill must be filed. *Cresswell v. Bateman*, 6 Week. Rep. 206.

NOTE.—On a renewal of the application in the above case, the judge, V. C. Kindersley, held that a common order to revive, under the 15 & 16 Vic. c. 86, is sufficient, though formerly a supplemental bill in the nature of an original bill would have been requisite. *Cresswell v. Bateman*, 6 Week. Rep. 220.

SECURITY FOR COSTS [vol. 3, pp. 93, 128, 297, 318].—*Misdescription—Next friend of infant* [vol. 3, p. 390].—The next friend of infant plaintiff described himself as of a certain address, "clerk." From inquiries made upon the spot, it appeared that he was in occupation of the house mentioned in the description, but was a letter-carrier in the General Post-office. Motion by the defendant to compel this next friend to give security for costs on the ground of misdescription, refused with costs. *Watts v. Kelly*, 6 Week. Rep. 206.

COMMON LAW.

ATTORNEY AND CLIENT.—*Negligence—Omission to refer—3rd section of the Common Law Procedure Act, 1854 [ante, pp. 27, 93]—Construction of that section [set out, 1 Law Chron. p. 157].*—After the writ in an action upon a bond to secure £1,000 had been served, the defendant wrote a letter stating that he had paid £430 over and above all interest which he was liable to pay, and that he was ready to pay the balance, £570. After receipt of this, the attorney for the plaintiff delivered the declaration, to which the defendant pleaded payment. When the cause was in the paper for trial, a judge's order was taken, by consent, for a reference to the master, who afterwards made his allocatur in the plaintiff's favour for £741 2s. 6d. with costs. The defendant became bankrupt between the receipt of the letter and the making of the allocatur: Held, an action being brought by the attorney for his bill of costs, and a cross action for negligence (Lord Campbell, C. J., differing in opinion), that there was no negligence on the part of the attorney, in his not applying, after the receipt of the letter, for an order to refer the case to arbitration, under the 3rd section of the Common Law Procedure Act, 1854. *Semle*, per Wightman, J., and Erle, J., that an application in such a case would not be within the section. *Chapman v. Van Toll*, 27 Law Journ. Q. B. 1.

ATTORNEY AND CLIENT.—*Authority to compromise [ante, p. 228]—Agreement as to costs.*—If an attorney have express authority from his client

to compromise the case only on condition of securing for him a certain net sum, that (coupled with the fact that he afterwards compromised the suit on payment of a larger sum, and professed to have compromised it in pursuance of that authority) may be evidence of an agreement upon his part to accept the surplus of the money paid over the amount of the net sum his client expected to receive, in satisfaction of his costs, not only as between party and party, but between attorney and client. *Churchyard v. Watkins*, 27 Law Journ. Ex. 18.

BILL OF SALE.—*Assignment for benefit of creditors—Registration*—17 & 18 Vic. c. 55.—The following is an Irish decision, of some importance, on the Irish Bills of Sale Act, which act is similar to the English one. A., being indebted to several persons, executed a deed, whereby he conveyed all his effects to B. as a trustee for himself and the other creditors, for sale, and out of the proceeds to pay, rateably, "the parties hereto who shall execute these presents, within one calendar month from the date hereof." Held, that such being an assignment for the benefit of all the creditors of the party making such assignment, it did not come within the provisions of 17 & 18 Vic. c. 55, and consequently did not require registration. *Ashford v. Tuile*, 30 Law. Tim. Rep. 222.

BILLS OF EXCHANGE.—18 & 19 Vic. c. 67.—*Summary remedy—Affidavit for leave to appear and defend* [vol. 8, pp. 99, 306].—Under the Bills of Exchange Act, 18 & 19 Vic. c. 67, the affidavit for leave to appear and defend need not disclose the defence with certainty necessary in a plea; but it is enough if it discloses reasonable and plausible grounds for supposing that there is a defence. Where (the action being by drawer against acceptor) the affidavit stated that the bill had been accepted for the price of coals supplied to a company, of which the defendant was manager, and the business of which had since been transferred to another company, who had agreed to pay the plaintiff for the coals; and that the plaintiff had re-invoiced the coals to the latter company, and had told the defendant that they would pay, and that he should look to them, and not to the defendant for payment,—the Court of Exchequer thought it sufficient, and allowed the defendant to defend the action; it being reasonably probable that there might upon the facts be a defence either on the ground of exoneration from the acceptance of the substituted liability of third parties, although an agreement with the plaintiff was not definitely stated, but only evidence of it. *Clay v. Turley*, 27 Law Journ. Ex. 2.

BOROUGH-ENGLISH [vol. 8, pp. 56—58].—*Custom of descent in manor—Entries upon roll, how far evidence of custom—Claim by youngest son of*

youngest brother of great grandfather (the purchaser) of person last seised—Borough-English—3 & 4 Will. 4, c. 106.—We have before (vol. 8, p. 56) noticed the decision of the Court of Exchequer in *Muggleton v. Barnett*, as to descents of borough-English lands not extending to the youngest brother. This decision has been affirmed by the majority of the Court of Exchequer Chamber. The principal case relied on was (as in the court below) *Denn v. Spray* (1 T. R. 466), which was said to be a direct authority against the plaintiff. It was there held by the Court of Queen's Bench, in a considered judgment, that proof by the custom of a manor that copyhold lands descended to eldest daughters, and if no daughters, then to the eldest sister, was no evidence to extend the custom to the eldest niece, or other collateral. It was said, in the judgment in that case, that custom being of the very essence of copyhold, if the custom be silent, the common law must regulate the course of descent. In *Doe v. Sisson* (12 East, 62), it was held, that reputation was evidence to go to the jury of an extended custom of descent to collaterals, though no evidence was given of actual instances in which such extended custom had been acted upon. The decision of the majority of the judges in the Exchequer Chamber proceeded on the ground that the authorities established the rule, that proof of a custom of descent, contrary to the course of the common law, prevailing in a nearer degree of consanguinity, is no proof that such custom extends to a more remote degree. The action was one of ejectment for copyhold premises, and the plaintiff claimed as heir-at-law, according to the custom of the manor, upon the death, in 1854, of B. B., the person last seised. E. M. purchased the premises in 1772, and upon his death, in 1812, they descended to his two infant grand-daughters as coparceners; one of these died unmarried, and was succeeded in her moiety by her sister, who, in 1836, married the defendant. Upon the death of the married sister in 1838, the premises descended to B. B., the only child of the marriage; and on his death, in 1854, the lineal descendants of E. M. (the great grandfather of B. B.), became extinct. The plaintiff was the youngest son of the youngest brother of E. M., the great grandfather (the purchaser) of B. B., the person last seised. In support of the plaintiff's title, according to the custom, it was proved that the lands in the manor descended lineally to the youngest son of the person last seised *ad infinitum*, and if no son, to the daughters as coparceners; if no lineal heirs, then to the youngest brother of the person last seised, and to the youngest son of such youngest brother; and if the youngest brother died without issue, to the next youngest brother; and if no brother, then among the sisters as coparceners. This

custom was proved by numerous entries upon the rolls of the manor from 1648 downwards. There was no customary or formal record of the custom, nor any evidence of reputation even that the custom extended to collaterals further than might be inferred from the entries themselves in the particular instances. Amongst such instances, there was one entry of descent and admission of the youngest son of an uncle of the person last seised, and one entry of descent and admission of the youngest sons respectively of two sisters, heirs parceners of the person last seised; but there was no instance on the rolls in which the custom had been extended to more remote relations: Held, by the majority of the court (affirming the judgment of the Exchequer), that the evidence afforded by the entries above mentioned was insufficient to prove that the custom of descent extended to so remote a collateral relation of the person last seised as the plaintiff, and that he was not entitled to recover. *Muggleton v. Barnett*, 6 Week. Rep. 182.

BILL OF EXCHANGE.—*Indorsement by acceptor—Liability* [First Book, 211].—To an action on a bill of exchange by the indorsee, the defendant pleaded that the indorser was both drawee and acceptor: Held, on demurrer, that such defence constituted no answer to the action, as nothing but payment at maturity will discharge either drawee or acceptor. *Dowling v. Mangan*, 30 Law Tim. Rep. 202.

CONTRACT.—*Varying by parol evidence—Custom of trade—How far admissible to vary written agreement—Surprise.*—The principle of law is plain, that, where an agreement is silent as to the matter in controversy, it is competent for any party to show the existence of a custom in the class of persons whom that contract affects: attaching an incident to the contract, but not importing a term into it. Whether such a custom really do exist, is a question of fact; and, if nothing appear to the contrary, the parties will be taken to have acted in conformity with the custom. The leading case upon this subject is that of *Hutton v. Warren*, in which Parke, B., reviews the authorities. The question very frequently turns upon ambiguity in the terms of the contract. In the following case, it appeared that the owner of premises, which had, for many years, been used as a public-house, entered into a written agreement with the tenant, a licensed vintner, to the effect that the rent reserved should be "a weekly rent," and "payable weekly." The rent had always been payable weekly, independently of the contract: but the tenant paid his license annually, in the usual way of trade. The tenant having assigned his interest, an ejectment on the title was brought against himself and his assignee, the tenant in possession:

Held, that evidence was admissible to prove a custom in the trade of licensed vintners, according to which, the tenant, paying license, is deemed to have a yearly tenure, although the rent reserved be payable weekly. *Lundy v. Reilly*, 30 Law Tim. Rep. 223.

CONTRACT.—*For sale of goods in possession of third party—Distinction between sale of delivery order and sale of goods—Condition for delivery within a reasonable time.*—Where there is a contract for the sale of goods, although described as lying in the possession of wharfingers, carriers, &c., subject to their lien for charges, yet there is an implied undertaking on the part of the seller that they shall be delivered to the purchaser, on his application, within a reasonable time, and readiness to pay the charges thereon; and if, upon such application, the delivery is refused, the seller will be liable for damages to the purchaser. *Buddle v. Green*, 27 Law Journ. Ex. 33.

CONTRACT.—*Delivery as an escrow* [vol. 3, p. 302].—*Letters accompanying signature—Construction of, a question for the court.*—Although, in general, the question whether a contract has been executed only as an escrow is for the jury, because it generally depends on facts proved by oral evidence (as in *Pym v. Campbell*, 25 Law Journ. Qu. Ben. 277), yet where the evidence is in writing, as where the contract, signed by one party (even after signature by the agent of the other), is sent inclosed in, or is accompanied by, a letter explaining that it is only signed on condition of something being done. As, for example, a counterpart being executed by the other party, the construction of such evidence is for the judge. And, held (*dubitante* Bramwell, B.), that such evidence was sufficient to show that the contract was signed, and sent only as an escrow, to take effect after the condition was performed. *Furness v. Meek*, 27 Law Journ. Ex. 84.

DISTRESS.—*For rates—Distraint a second time for the same rates.*—In *Dawson v. Cropp* (1 C. B. 96), it was decided that trover would lie against a landlord who made a second distress for the same rent when he might have taken a sufficient distress at first, but he voluntarily abandoned it. But a second distress may be made if the first has been rendered useless by the conduct of the defendant. Thus, a distress having been levied, and a sale effected of the goods, the party distrained upon interfered, and so prevented the removal of the goods, and the buyer therefore repudiated the purchase; it was held, that a second distress might, under the circumstances, be lawfully made for the amount of the same rate. *Lee v. Cook*, 30 Law Tim. Rep. 169.

EXECUTION.—*Custody at the suit of plaintiff—Discharge by the plaintiff's attorney—Satisfaction of a debt.*—Where a writ of *ca. sa.* is countermanded by

the plaintiff's attorney, before any arrest of the defendant, his arrest under the writs of other parties does not make him in custody at the suit of the first plaintiff; and a discharge by such plaintiff's attorney from such custody is no discharge of the debt. *The National Assurance Company v. Best*, 27 Law Journ. Ex. 19.

EXECUTION CREDITOR.—*Interpleader*—19 & 20 Vic. c. 97 [3 L. Ch. 88—92, 210]—*Retrospective operation*—*Goods bound*—*Delivery of writ without notice*—*Subsequent sale void as against the judgment creditor*.—The statute 19 & 20 Vic. c. 97 (vol. 3, pp. 88—92), has no retrospective operation, and does not affect rights existing at the time of its passing. Where it appeared, on an interpleader issue, that the plaintiff, the claimant, had purchased chattels from the execution debtor after a writ of *f. fa.* against the seller had been delivered to the sheriff, and that the statute passed before the purchase, but after the delivery of the writ,—it was held, that, even assuming that the plaintiff had not had any notice of the writ at the time of the purchase, &c., the chattels at the time the statute passed were already bound by delivery of the writ. *Quere*, whether notice of a writ, without notice of its amount, is sufficient. *Williams v. Smith*, 26 Law Journ. Ex. 371.

GUARANTEE [vol. 2, p. 8].—*Authority to pay further advances*—*Construction of*.—The maxim *verba fortius accipiuntur contra proferentem* applies to the case of a guarantee (*Mason v. Pritchard*, 12 East, 227), and the principle there laid down was approved of and acted on in *Mayer v. Isaacs* (7 Law Journ. Ex. 225), expressly disapproving of the decision in *Nicholson v. Paget* (1 Cr. and M. 48), in which a contrary principle was acted on. Defendant, being agent to receive rents for A., undertook, upon A. giving him an authority to do so, to repay the plaintiff, out of the first money received on A.'s account, anything the plaintiff might be pleased to advance to A. A gave the defendant this authority: "Please to pay (the plaintiff) the sum of £20 by four instalments—namely, £5 each quarter—from my estate, commencing from the 29th September, 1852, until September, 1853; and should any money be owing by me to her after that time, please to pay same way as above." Held, that the authority was not confined to the payment of the £20, but authorised the payment of further advances made by the plaintiff to A. *Horlor v. Carpenter*, 27 Law Journ. C. P. 1.

HUSBAND AND WIFE [ante, p. 231].—*Deed of separation*—*Covenant for separate provision of wife*—*Reconciliation and renewal of cohabitation*.—The following case recognises the validity of an allowance by a husband to his wife, arising out of a

separation, and shows how to frame such a provision so that a subsequent cohabitation shall not cause the cesser of the allowance:—A husband, by a deed of separation, covenanted that, by way of provision for his wife, he would pay to the trustee during her life 10s. weekly, with a proviso that, in case the husband and wife should at any time thereafter voluntarily and mutually consent, by any writing under both their hands, attested, &c., to legally cohabit and live together, and so cohabit as man and wife for the space of one calendar month, the said deed should be thenceforth void; subsequently, the husband and wife, without any deed or writing under their hands, for a short time cohabited together: Held, that the deed was valid; that it was a post-nuptial settlement made by the husband upon his wife, and was not avoided by the cohabitation in question. *Randall v. Gould*, 30 Law Tim. Rep. 198; 6 Week. Rep. 108.

LANDLORD AND TENANT [ante, pp. 232, 233].—*Eviction, what amounts to* [First Book, p. 145; ante, p. 232].—*Molestation and disturbance*.—Land is mortgaged, and subsequently is let to a tenant who is not aware of the mortgage until he receives notice of it from the mortgagee. The tenant being advised that he cannot resist the mortgagee's claim, goes out and allows the mortgagee to take possession. This amounts to an eviction (per Willes, J.). At all events, it is a molestation and disturbance. *Carpenter v. Parker*, 6 Week. Rep. 98.

LIFE INSURANCE.—*Payment of premium—Estoppel by conduct*.—The case of *Salvin v. James* (6 East, 571) was preceded by the case of *Tarleton v. Stainforth* (5 Term. Rep. 695), which was an action on a policy against fire. The policy was subject to certain articles, one of which was that the assured "shall pay the premium to the next quarter day, and for one year more at least, and shall, so long as the managers agree to accept the same, make all future payments annually, within fifteen days after the day limited for their respective policies, upon forfeiture of the benefit thereof; and no insurance is to take place until the premium be actually paid by the assured." A loss by fire happened within fifteen days after the expiration of the time for which the policy was effected. The premium for renewal had not then been paid, but was tendered within the fifteen days. The court held that the policy was void, for that two things were necessary in order to keep it alive—the payment of the premium, and the acceptance of it by the managers. After that decision, an advertisement was published by the managers of the Sun Fire Office, and was never afterwards retracted. It was as follows:—"The managers of this office do hereby inform the public that all persons insured in this office by poli-

cies taken out for one year or for a longer term, are, and always have been, considered by the managers as insured for fifteen days beyond the time of the expiration of their policies; but that allowance of fifteen days does not extend to policies for shorter periods, which cease at six o'clock in the evening of the day of the expiration of the time mentioned in the notices." Salvin and others, on the 11th of November, 1802, caused to be effected, in the Sun Fire Office, a policy for £3,000 on their cotton mill, and from the 11th of November, 1802, to the 25th December, 1803. In November, 1803, the managers gave notice that from and after the 25th of December, 1803, they would not continue the insurance without an increased premium, which Salvin and others refused to pay. On the 7th of January, 1804, being within fifteen days from the expiration of the time mentioned in the policy, the premises were consumed by an accidental fire; and on the 8th, Salvin and Company tendered the increased premium which had been demanded by the office. This was refused, and an action was commenced against the office on the policy. The declaration averred that, in consideration, &c., the defendants undertook and promised the plaintiffs that their property should be considered by the managers as insured for fifteen days beyond the time of the expiration of the policy, and that within the fifteen days a loss by fire happened. *Plea non assumpsit*. The policy, when produced at the trial, contained a reference to the printed proposals, the third of which was as follows:—"On bespeaking policies, all persons are to make a deposit for the policy, stamps, duty, &c., and shall pay the premium to the next quarter-day, and from thence for one year more at least; and shall, as long as the managers agree to accept the same, make all future payments annually at the said office within fifteen days after the day limited by their respective policies, upon forfeiture of the benefit thereof, and no insurance was to take place till the premium be actually paid by the insured." A special case was stated for the opinion of the court, and on the argument the decision in *Tarleton v. Stainforth* was not questioned; but it was contended that the policy in this case must be construed by the advertisement, and that the property was protected by the original policy for fifteen days after the expiration of the year. Lord Ellenborough and the court held that the third article must be considered as corrected by the advertisement, for that both could not stand together; that the result was, that the latter part of that article must be considered as applicable to the first year only, and that the option of the managers to continue the policy or not must be exercised before the expiration of the current year; that if the option to discontinue the policy had not been so

exercised, the property would have been protected during the fifteen days; but that, it having been so exercised, the policy ceased on the expiration of the year, and the plaintiffs could not recover. In the following case, it appeared that W. W. Simpson had effected an insurance against death or injury by accident with the defendants, the premium on which was payable on the 22nd of January in each year. The insured was injured, and died on the first of February, 1856. The premium due on the 22nd January preceding was then unpaid. The policy was, on the 4th, forwarded by the executors to their solicitor; who, on the same day, wrote to the defendants announcing the death. On the ensuing day the secretary of the company wrote in reply, transmitting a form to be filled up in the ordinary way, and notifying the necessity for the certificate of a medical man of the cause of death. That letter was silent as to the premium due on the 22nd not having been paid, it being then unknown to the secretary and the defendants, as it was to the plaintiffs and their solicitor, that it had not been paid. The secretary, on the 7th, learning from an agent of the company that it had not been paid, on the 13th the directors resolved to repudiate the claim on the ground that the premium had not been paid within twenty-one days, and the secretary communicated that to the plaintiffs. The plaintiffs commenced an action against the defendants, and in their declaration averred that the policy continued in force at the time of the death of the insured, and that, while it continued in force, he met with an accident which, within three months after its occurrence, and within twenty-one days after the 22nd of January, 1856, caused his death. The defendants pleaded that, before the accident and death, one of the premiums became due, and remained unpaid for twenty-one days, whereby the policy became void. Replication that the defendants ought not to be admitted to plead the first plea, because, from the time of the death of the insured, until the expiration of twenty-one days, the plaintiffs were in communication with the defendants on the subject of the policy, and the death, and of the claim against the company; and that in the course of such communications, the defendants wilfully caused the plaintiffs to believe that the policy was in full force; and that they, the plaintiffs, had no means of ascertaining from any documents in their possession whether the premium had been paid or not. The policy declared that if the assured should suffer injury from any accident on or before the 22nd of January, 1852, and subsequent thereto during the continuance of the policy, provided he, the insured, on or before, or within, twenty-one days after the 22nd of January, 1852, and on or before, or within, twenty-one days after

the 22nd of January in every succeeding year, so long as the acting directors should accept the same, pay, or cause to be paid to the said company, the annual premium of £12, then, subject as therein or in the indorsement thereon was mentioned or referred to, the subscribed capital should be liable, &c. The first condition was as follows:—"The premium on this policy is to be paid within twenty-one days from the day on which the same shall first accrue or become due; and provided the same be from time to time paid within such space of twenty-one days, this policy shall not be void notwithstanding the happening before the expiration of such space of twenty-one days of the event, or events, upon the happening whereof the amount secured by this policy shall become payable." Second condition:—"If the premium on the policy be unpaid for the space of twenty-one days, the policy is to become void." Fourth condition:—"In every case where a new premium shall become payable, the directors shall be at liberty to terminate the risk by refusing to accept such premium." Held, first, that if the plaintiffs had tendered the premium after the death of the insured, and within twenty-one days of the 22nd of January, the directors were not bound to accept it. Secondly, if that were not so, the policy under the second condition was absolutely void, the premium not having been paid within twenty-one days, and the defendants not having, by their words and conduct, wilfully caused the plaintiffs to believe that the policy was in full force: Held, also, that neither the plaintiffs nor the assured, had he been alive, would have had an absolute right to keep the policy alive by payment or tender of the premium within twenty-one days. *Simpson v. The Accidental Death Insurance Company*, 30 Law Tim. Rep. 31.

LIFE INSURANCE.—*Interest*—*Policy made for the benefit of a third party* [ante, p. 51; vol. 1, p. 273].—Although, where insurance is really effected by the party insured, the mere circumstance that another party pays the premiums may not be conclusive, or even *per se*, sufficient evidence to warrant a jury (or the Court of Exchequer upon a special verdict) in finding that the interest was not in the insured (*Friston v. Hardey*, 14 Beav. 232; and *Shilling v. The Accidental Death Insurance Company*, 2 Ex. Rep. 42; 8. C. 26 Law Journ. Ex. 260); yet where the insurance is effected by the party nominally insured, at the instance and for the benefit of another, who is to pay the premiums, and in pursuance of an arrangement between them under which he immediately secures the sole benefit of it (by assignment or bequest), the evidence will be so conclusive that the interest is really in the third party (so that the policy is void for not having

been in his name), that the court will set aside a verdict for the plaintiff in an action brought by him or his representatives upon it. *Shilling v. The Accidental Death Insurance Company*, 27 Law Journ. Ex. 16.

LIFE INSURANCE.—*Covenant to keep up a policy as security*—*Covenanters lenders as well as insurers*—*Measure of damage* [vol. 3, pp. 259, 298].—On a covenant with an insurance company to keep up a policy in their office as security for money lent by them, the policy being dropped after the first year, and the principal and interest having been recovered by judgment, the measure of damage is not the premiums which would have been payable to the company had the policy been kept up; the true principle in such a case is the real injury, if any, sustained, either through loss of the security, or the expenses incurred in effecting another insurance. *The National Assurance Company v. Best*, 27 Law Journ. Ex. 19.

LIMITATION OF ACTIONS.—*Exception as to prisoner or person beyond the seas*—*Mercantile Law Amendment Act, 1856* (19 & 20 Vic. c. 97, s. 10)—53 Geo. 3, c. 118, s. 13.—The 10th section of the 19 & 20 Vic. c. 97, prevents any person, after the passing of the act, in cases where he might otherwise have brought an action after the time limited by the statutes mentioned in the section by reason of his being beyond the seas or in prison when the cause of action accrued, from commencing an action after the time so limited, at whatever time the cause of action may have accrued (see 3 Law Chron. 91; as to being retrospective, see 3 Law Chron. 217). To an action for the non-payment of certain allowances to be made under 53 Geo. 3, c. 118, to the plaintiff, as a poor debtor in the Queen's Prison; plea, under the 18th section, that after the plaintiff became a prisoner he became entitled to be discharged under an act for the relief of insolvent debtors: Held, that the plea was good. *Cornill v. Hudson*, 27 Law Journ. Q. B. 8.

MONEY HAD AND RECEIVED [vol. 3, p. 49].—*Bill of exchange*—*Bankers' transfer on account*—*Appropriation*—*Privity*.—In *Williams v. Everett* (14 East, 582), the leading case upon the subject, and other cases (see *Wedlake v. Hurley*, 1 Cr. and J. 83), it was held that the holder of a bill or order for money cannot recover against the remittee of money to pay it. In the following case, it appeared that the acceptor of a bill paid money to his bankers, the defendants (at whose correspondents' house it was payable), for the purpose of taking that and other bills up, and they promised him to apply it to such purposes, and entered the particular bill to their credit in their books, but it did not appear that they had advised their correspondents to pay it:

Held, that the drawer (holder of the bill) could not sue the bankers for the amount of the bill, there being no privity to sustain the action. *Moore v. Bushell*, 27 Law Journ. Ex. 3.

MONEY HAD AND RECEIVED.—*Failure of consideration—Misapplication by officer of society of the money.*—The plaintiff purchased the interest of a member of a building society in certain premises mortgaged to the society, and thereafter paid to the defendant, the manager, certain subscriptions or instalments in respect thereof, who misapplied the money. By the rules the manager, in conjunction with the treasurer and one of the trustees, was justified in receiving subscriptions: Held, that an action for money had and received would not lie to recover back the subscriptions so paid, as the money was received by the manager for the society, and not for the plaintiff; and even if it would lie, the member and not the plaintiff should have sued. *Haverson v. Cole*, 6 Week. Rep. 17.

NEGLIGENCE.—*Liability of railway company for injury to straying cattle—Railway Clauses Consolidation Act, 8 & 9 Vic. c. 20, ss. 46, 61—Negligence of plaintiff contributing to injury [ante, p. 232].*—Although there may be cases, even in actions for neglect of duty, in which the question, whether the plaintiff contributed to the loss or injury by his own negligence, may not properly arise on the general issue; yet it may arise, even in actions for breach of a statutable regulation, where any duty has been cast upon the plaintiff, either by the statute or through his own position or conduct, the neglect of which has so far contributed to the injury, that it has not been caused entirely by the wrongful act or neglect of the defendants. *Ellis v. The London and South-Western Railway Company*, 26 Law Journ. Ex. 349.

NEGLIGENCE [ante, p. 214].—*Action, when maintainable—Management of works constructed by authority of act of Parliament.*—Where a work of a public character (as a canal) has been constructed under the authority of an act of Parliament, a right of action for an injury not occasioned wilfully, nor by any act necessarily causing it, but arising from the user of the work (as, for instance, through the overflow of the water in the canal), must be founded on negligence; and negligence is of the essence of the action; and although the jury have given a general verdict for the plaintiff, and it has been proved that the proximate cause of the injury was an act of the defendant's servants (as raising a flood-gate); yet, if it is doubtful whether that act necessarily must have caused the injury, and the jury also find that there was no negligence, the verdict will be entered for the defendants. *Whitehouse v. The Birmingham Canal Company*, 27 Law Journ. Ex. 25.

PARLIAMENTARY ELECTIONS.—*Vote—Promotion to an "office"—Reform Act, 2 Will. 4, c. 45, s. 18.*—The 18th section of the Reform Act, enacts, that no person shall be entitled to vote in respect of any freehold lands or tenements whereof such person may be seised for his own life, or for the life of another, or for any lives whatsoever, except in the cases of certain specific exceptions, one of which is, that the same shall have come to him by promotion to a benefice or office. By the direction of a will, land was purchased and conveyed to trustees upon trust to apply the rents to various charitable purposes; and amongst others to pay to and divide amongst certain persons called the beadsmen of D. a certain portion of the rents. There is no evidence of the first appointment of the six beadsmen; but from very early times the same number have been kept up, the appointment of them being in the bailiff and burgesses of D., who are also trustees under the said will. The appointment is for life. The present six beadsmen have all been appointed since the passing of the Reform Act. Neither under the trusts above referred to, nor in their character as beadsmen, are they liable to be called upon to perform duties or services of any kind, nor have they ever been so called upon: Held, that assuming that the six beadsmen had an equitable estate in the land, that estate had not come to them by promotion to an "office," within sec. 18 of the Reform Act, 2 Will. 4, c. 45. *Faulkner v. The Overseers of Boddington*, 6 Week. Rep. 101.

PARTNERS.—*Debtor and creditor—Banker—Transfer of account—Appropriation.*—The acting member of a firm has implied authority to assent to the transfer of their account from one banker to another, without the express assent of the others; though *quere* whether the acting partner would have implied authority to borrow money from the party to whom he transferred the account, in order to pay off the original creditor. *Beal v. Caddick*, 26 Law Journ. Ex. 356.

PROBATE DUTY.—*Liability for, as respects shares in railway companies registered in Scotland.*—Shares in railway companies are assets in the country in which the holders must be registered; and therefore it is in that country the probate duty must be paid thereon by the executors or administrators of deceased proprietors. And this is not affected, in regard to Scotch shares, by the Companies Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vic. c. 16, s. 20), so that such shares must be inventoried and duty paid thereon in Scotland, even although the probate duty actually paid within another jurisdiction would afford a margin sufficient to cover the duty payable in respect of such shares. *Attorney-General v. Higgins*, 26 Law Journ. Ex. 403.

PUBLIC COMPANY.—Pleading—Several matters—Contracts by directors of joint-stock companies in excess of their authority (under 7 & 8 Vic. c. 110, s. 29), and to the prejudice of their shareholders—Interested directors [vol. 3, p. 49; *ante*, p. 251].—The 7 & 8 Vic. c. 110, s. 29 (set out vol. 3, p. 49), enacts that if any director be interested in the contract, except a policy of assurance, grant of annuity, or other contract, the subject of the proper business of the company, such contract being made upon the same or like terms as any like contract with other parties, it must be confirmed at a meeting of the shareholders. In an action against a joint stock insurance company, on a deed of annuity granted by three directors of the company, the defendants were allowed to plead, along with *non est factum*, two special pleas, the abstract of one of which was, "that the deed was invalid under the 29th section of the Joint-Stock Companies Registration Act" (7 & 8 Vic. c. 110), the plea showing it was one in which directors were interested, and that it had not been confirmed at any meeting of the shareholders; and the abstract of the other being, "that the directors, in making the deed, had no power to bind the company; that it was in excess of their authority, and to the prejudice of their shareholders; and that the plaintiff knew this when he took it." But an affidavit was required. *Curteis v. The Anchor Assurance Company*, 27 Law Journ. Ex. 14.

SHIPPING.—Shipowner—Non-payment of freight—Lien on cargo.—Freight properly so called, that is, the amount receivable for the carriage, conveyance, and delivery of goods, a shipowner is entitled to a lien on the cargo, unless he has entered into a contract at variance with that lien, as, for example, in cases where the contract is to pay after the delivery of the cargo, and not at the time of its delivery. In the following case it was decided that a shipowner is not entitled to a lien for non-payment of freight, as against the consignees of goods, on the goods consigned to them by his ship under a bill of lading, stating that the freight for the same goods was to be paid by the shipper, with these words in the margin of the bill, "Freight payable one month after sailing, ship lost or not lost." *How v. Kirchner*, 6 Week. Rep. 198.

SHIPPING.—Bottomry—Agreement to postpone payment—Mortgagees—Part owner.—The want of personal credit, the necessity of defraying the expenses of repairs and outfit to complete the voyage, the exigency occasioned by distress from wind, weather, or accident, the sum required,—all these are circumstances which justify the execution of a bottomry bond; and when the owner authorises the execution of a bottomry bond, his consent is very strong evidence of all these facts. It must be

presumed that an owner would not so consent, save it was to his interest so to do. Indeed, by the law as now laid down by the judicial committee, the consent of the owner must always be obtained when it is possible to communicate with him. This was held, in a recent case (*Wallace v. Fielden, The Oriental*, 7 Moore P. C. 408), to be so essential that the bond was held void for the want of such communication. Formerly this rule was not so stringently applied. In *Glascott v. Land*, 2 Phil. Rep. 321, Lord Chancellor Cottenham declared that there was no authority to support such a proposition. A British ship, owned at Liverpool, Nova Scotia, having concluded at New York a voyage from Glasgow, her master, with the consent of her managing part owner, gave a bottomry bond, payable at New York, on her return to a port of discharge in the United States or British North America. On the termination of the contemplated voyage, the bondholder agreed with the same managing part owner (but without the knowledge or consent of a co-owner) to postpone the payment of the bond till after the conclusion of a subsequent voyage, and her arrival at a port of discharge as before, the bond to remain a lien on the ship. Such voyage was performed, but no proceedings were taken to enforce the bond until the arrival of the ship at Liverpool in England, when it was arrested by warrant of the Court of Admiralty: Held, that it is not competent for the master, with the consent of owner, to grant a bottomry bond, suable in the High Court of Admiralty, upon a British ship lying in a British port for a new voyage; that a bond granted upon a British vessel in a foreign port for the expenses of repairs or outfit for a new voyage, with consent of owner, is valid, at least against the owner, in a suit in this court; that a bond may be given, though money has not actually been advanced, to a person who has pledged his own credit for the expenses incurred; that where a low rate of interest is taken on a bottomry bond, it raises a suspicion that sea risk (which is essential to the jurisdiction of the court) was not intended; that, generally, the consent of a managing owner to a bottomry bond will bind his co-owner, but that he has no power to bind his co-owner without his consent by a mortgage, or an agreement equivalent to a mortgage; that a bottomry bond cannot be granted for a debt incurred on a former voyage; and that a voluntary agreement of the holder of a bond to postpone payment under it, substitutes a personal for the original contract, and is one over which the Court of Admiralty has no jurisdiction. *Semble*, that the Admiralty Courts in the United States and in our North American colonies exercise a wider jurisdiction than the High Court of Admiralty in England; that, to bind creditors and

other claimants, a bottomry bond should be enforced within a reasonable time after it is due. *The Royal Ark*, 6 Week. Rep. 191.

SHIPPING.—Collision—Abandonment—Salvage—Damage.—A brig and ship came into collision; both were pronounced to blame, and would, according to general rule, divide the damage. The brig having been abandoned by her master and crew, was subsequently towed by another vessel into a port, and there repaired. The owners of the ship contended that the abandonment was unnecessary, and that if so, a sum which had been awarded to this vessel for salvage ought not to be included in the damages: Held, that in cases of collision, the master and crew are not bound to incur any extraordinary risk with a view to preserve the vessel; that when both vessels are to blame, the presumption is that damage immediately arising is in consequence of such collision; and that, under the circumstances of the case, the abandonment was unnecessary, and the amount paid for salvage is not to be included in the damage. *The Georgina v. The Linda*, 6 Week. Rep. 196.

SHIPPING.—Collision—Damage—Wages—Priority.—Where a foreign ship is condemned in damage arising from a collision, and the proceeds of the sale are not more than sufficient to meet that damage, her crew have no prior right as against the ship in the Court of Admiralty for their wages. *Linda Flor*, 30 Law Tim. Rep. 234.

TRESPASS.—Title—Conveyance of the soil—Possessory right to sustain the action.—A possessory right, sufficient to sustain trespass, may be resorted to, even after it has appeared that the plaintiff has, in fact, no legal title, and when the *locus in quo* is the soil of a street, and the only actual possession he set up is, by his recent commencement of a building upon the *locus in quo*, the pulling down of the incomplete walls of which was the trespass complained of, and which were pulled down on the suggestion that they constituted a nuisance to a highway. Thus, where the plaintiffs in trespass, the owners of a street of houses, failed to show that the deed under which they claimed conveyed the soil of the street, and the trespass complained of was in pulling down the wall of a house they were building across one end of it, which had been commenced a short time before, and the defendants, highway commissioners, pleaded not possessed, and justified in abatement of a nuisance on a highway, but did not justify under the owner of the soil,—it was held, that the plaintiffs had a possessory right sufficient to sustain the action, and were entitled to resort to it upon the issue on not possessed; and, on such evidence unrebutted, and the *locus in quo* not being proved to be part of the highway, the plaintiffs ultimately recovered. *Every v. Smith*, 26 Law Journ. Ex. 344.

USE AND OCCUPATION.—*Relation of landlord and tenant—Effect of payment of rent to cestui que trust with authority of a co-trustee.*—An action for use and occupation is one of contract, and is founded on the relation of landlord and tenant; it therefore requires evidence of an occupation by the permission of, and under a contract with, the plaintiff; and though the title on the part of the plaintiff and occupation by the defendant may, in the absence of any other evidence, be a *prima facie* case from which such a contract may be inferred, yet where the letting has been by another party, the plaintiff will not be allowed to recover. So where he fails to prove title or actual contract with himself, and where the letting has been by another party, mere notice by plaintiff (even though he has the title) to pay the rent to him, will not convert the occupation into an occupation by his permission and under a contract with him; for such notice, unless assented to by the tenant, does not create a new contract, and can only enable the party to bring ejectment to recover possession of the premises. *Churchward v. Ford*, 26 Law Journ. Ex. 354.

COMMON LAW PRACTICE.

AMENDMENT.—*Order by consent—Agreement not to bring error—Judge's order to stay.*—If an order made by consent is, through mistake, capable of an interpretation contrary to the real intention, it will be amended by the court so as to make it plainly and clearly represent that intention. Where the parties had agreed to a special case, the order by consent containing these words: "The parties agreeing in every respect to be bound by the judgment of the court;" and after judgment the unsuccessful party brought error; and the other party obtained an order to stay proceedings in consequence of the former order, which he represented as an agreement not to bring error; and the party who brought error swore that the words were inserted in the order, because there were questions besides mere liability, as amount, &c.; and the parties wished all the questions raised to be decided; and the other party did not distinctly deny this; and there were in fact various questions raised by that case: the court rescinded the second order, and also amended the first order; by striking out the words inserted: the court, considering that they did not amount to an agreement not to bring error, but that the party who sought to sue out error might not be embarrassed by any difficulties arising from an order which has been made in terms not intended. *Oldershaw v. King*, 26 Law Journ. Ex. 384.

ARBITRATION.—*Common Law Procedure Act, 1854, s. 8 [vol. 1, p. 157]—Reference—Award—*

Sending back—Jurisdiction.—Under sec. 8 of the Common Law Procedure Act, 1854, the Court of Common Pleas has jurisdiction to remit the matters referred to the reconsideration of the arbitrator, where there is no clause to that effect in the order of reference, in cases only where they might before the statute have remitted such matters where there was such a clause. *Hodgkinson v. Fernis*, 6 Week. Rep. 181.

CONSOLIDATION OF ACTIONS.—*Actions on marine policies—Bankruptcy—Assignment of one policy—Set off.*—A number of actions against different under-writers of policies on the same cargo were ordered to be consolidated into two actions, notwithstanding the owners of the goods on which the policies were effected had subsequently become bankrupt, and that their interest in one of the policies had been assigned prior to the bankruptcy, and that there was a question in each of the actions as to whether there was a right to set off premiums against losses. *Syers v. Pickersgill*, 6 Week. Rep. 16.

COSTS.—*Review of taxation—Application for, to be made at chambers in the first instance—Error in calculation.*—The Court of Exchequer will order a review of the master's taxation where he has clearly made an error of calculation, or in the construction of an order as to the allocation of costs between the parties. But all such applications should, in the first instance, be made at chambers. *Levett v. Rothwell*, 27 Law Journ. Ex. 6.

COSTS.—*Material witnesses—Attorney and London agent not allowed.*—The ordinary rule, not to allow on taxation the expenses both of the attorney and the London agent of the attorney of the party as witnesses in the cause (where it is tried at a town where neither of them reside), is relaxed, where it clearly appears that both of them were material and necessary witnesses for the party, as where one had written a letter and received an answer, and the other had communicated the answer to the plaintiff. *Chapman v. Rodway*, 27 Law Journ. Ex. 7.

COSTS.—*Settlement of action pending amendments of pleadings and before final joinder of issue—Review of taxation, when directed—Exercise of the master's discretion.*—Where the master has, in taxing costs, made a manifest mistake in calculation, as in *Levett v. Rothwell* (27 Law Journ. Ex. 6), or has erroneously allowed or disallowed any item on some supposed rule which does not apply, as in *Chapman v. Rodway* (27 Law Journ. Ex. 7), the court will correct his decision. And where he has erroneously declined to exercise his discretion, on the supposition that some rule precluded him from so doing, the court will interpose, and will direct him to exercise his discretion and review his taxation. But where

he has exercised his discretion, although the court will correct his decision if it is manifestly wrong, they will not do so when it is doubtful whether it is so. Where there has been issue joined, but the plaintiff has had leave to add a fresh count, the pleadings to which are not concluded when the action is settled, it is not so clear that the ordinary rule of not allowing costs of briefs, &c., before final joinder of issue, does not apply, that the court will interfere to review the master's taxation disallowing those costs; at all events, if he has not merely acted on the rule, but has also exercised his discretion on the whole case. *Knight v. The Gravesend Railway Company*, 27 Law Journ. Ex. 8.

COSTS.—*Taxation of—Principle on which the court will direct a review of taxation—Discretion of the master after an order to review.*—Acting upon the rule laid down in *Chapman v. Rodway* and *Knight v. Gravesend Railway Company* (27 Law Journ. 7, 8, *supra*), where the master had been directed to review his taxation as to the disallowance, as between attorney and client, of the expenses of plaintiff's attorney for attending at the trial (in London), and he had reconsidered the matter and again disallowed the charge, considering that it had not been sufficiently sustained, the Court of Exchequer refused a rule directing him again to review his taxation. *Pobjoy v. Rich*, 27 Law Journ. Ex. 10.

COSTS.—*Taxation of, as between attorney and agent—Expenses of witness—Special agreement—Reasonable charge for attendance of attorney.*—Where there is the common order to tax a bill, as between attorney and client, or attorney and agent, no reservation of the question of retainer or liability, the master has, nevertheless, jurisdiction to consider whether any item is a proper item of charge, and is not confined merely to the question of amount. And if the agent, having attended a case as a witness, has charged for his attendance something beyond the ordinary charge of a witness, the master will be justified in disallowing such extra charge, unless there is some special contract to pay a reasonable remuneration, in which case it will be for the master to say what is reasonable. *Sollery v. Flewker*, 27 Law Journ. Ex. 11.

DEFENDANT ABROAD.—*Common Law Procedure Act, 1852 (15 & 16 Vic. c. 76, s. 18)—Defendant resident abroad—Order to proceed against—Insufficient affidavit—Setting aside proceedings—Practice—Reasonable time—Irregularity—Waiver of by taking fresh step—135th Practice Rule Hilary Term, 1853 [see vol. 3, p. 386; vol. 3, p. 130].*—A British subject resident abroad was sued in the manner pointed out by the 15 & 16 Vic. c. 76, s. 18, and not having appeared, a judge's order was made, for leave to plaintiff to proceed in the action, upon

an affidavit which did not show that the cause of action arose within the jurisdiction of the superior courts, or was in respect of the breach of a contract made within the jurisdiction: *Semble*, that the affidavit was insufficient, and its insufficiency a good ground for setting the order aside. The writ, which was in the general form prescribed by section 18, No. 2, Schedule A., issued on the 12th of September, and was served on the defendant abroad on the 17th, the order to proceed was made on the 27th of October, but was not served; the declaration was filed on the 28th of October, and the indorsement thereon required the defendants to plead within twenty-one days, and before the expiration of that time the defendant took the declaration out of the office of the Court of Common Pleas, and on the 17th of November applied to set aside the order, and subsequent proceedings: Held, that the application was made in reasonable time. But, inasmuch as the defendant when he took the declaration out of the office of the court had the means of knowing, and it did not appear that he did not know the contents of the affidavit on which the order to proceed was made, and that the plaintiff's proceedings were open to the objection now taken: Held, that he came within that branch of the 135th Practice Rule Hilary Term, 1853, which prescribes "that no application to set aside process or proceedings for irregularity shall be allowed, if the party applying has taken a fresh step after knowledge of the irregularity." *Bayne v. Slack*, 27 Law Journ. C. P. 14.

EQUITABLE DEFENCES [vol. 3, p. 307].—*Common Law Procedure Act*, 1854, 17 & 18 Vic. c. 125, s. 83 [stated 1 Law Chron. 162].—*Equitable defence—Unconditional relief*.—The relief spoken of in section 83 of the *Common Law Procedure Act*, 1854, enabling the defendant to plead by way of equitable defence such facts as would entitle him to relief against judgment in the action in a court of equity, means absolute, unconditional relief. *Flight v. Gray*, 27 Law Journ. C. P. 13.

INJUNCTION AT LAW.—*Duration of—Continuing nuisance—Attachment—Costs*.—Where a writ of injunction has been granted by a court of common law under the *Common Law Procedure Act*, 1854, s. 82 [set out 1 Law Chron. 162], to restrain the defendant from committing the nuisances for which the action has been brought, such injunction continues until it is got rid of by the defendant; even after a reference to an arbitrator (on motion for an attachment), and alterations of the defendant's works in accordance with the arbitrator's recommendations, so as to prevent the recurrence of the nuisance. And it is competent for the plaintiff to apply at any time for an attachment in case of dis-

obedience to the injunction; and *semble*, during the long vacation he may apply to a judge at chambers. If on such a reference, under the authority of the court, pending a rule for an attachment, the arbitrator reports that, after the injunction issued, there was a continuance of the nuisance, the defendants will be liable to the costs of the rule and the reference (the costs having been reserved by the court for its discretion), even although, in consequence of their having adopted his recommendations, the rule for an attachment is not proceeded with. *De la Rue v. Fortescue*, 26 Law Journ. Ex. 339.

INTERROGATORIES [vol. 3, pp. 47, 53, 307, 325].—*Oral examination—Common Law Procedure Act*, 1854, s. 53.—*Affidavit*.—The jurisdiction of the court under section 53 of the *Common Law Procedure Act*, 1854 [stated vol. 1, p. 160], in case of omission without just cause to answer sufficiently written interrogatories under section 51, to direct an oral examination of the interrogated party, as it is a jurisdiction to be exercised at the discretion of the court, will be exercised with caution, and with a due regard to the nature and circumstances of the action: and, *quære*, whether, where upon the answers given to the written interrogatories, it is extremely doubtful in law whether the defendant is liable to be sued at all, the application will be acceded to; but in such a case, at all events, it will not be granted, where there is no affidavit in support of the application, even although the objection is not raised by the opposite party. Thus, where the defendant was sued as administrator, and answered to written interrogatories that he had not taken out administration in this country, nor administered nor intermeddled with any of the effects in this country, the court refused a rule that the defendant should be orally examined, there being no affidavit in support of the application; although the plaintiff showed cause in the first instance, and waived the objection. *Swift v. Nun*, 26 Law Journ. Ex. 365.

MANDAMUS.—17 & 18 Vic. c. 125, s. 68.—*Public duty under royal charter—Contract—Personal interest of plaintiff*.—By the *Common Law Procedure Act*, 1854, s. 68, the plaintiff, except in replevin and ejectment, may indorse on the writ and copy to be served a notice that the plaintiff intends to claim a writ of mandamus, and the plaintiff may claim in his declaration a writ of mandamus, commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested. In the case of *Beuson v. Paul* (6 El. and Bl. 273; 2 Law Chron. p. xlv), in accordance with the reasoning in 1 Law Chron. 317, 318, the Court of Queen's Bench held that the power to grant a mandamus under the statute must be confined to such duties as might have been enforced by a prerogative writ of man-

damus, and that therefore the writ could not issue to compel the specific performance of an agreement. But this decision does not extend to preclude the issue of a mandamus directing an incorporated company to do that which by their charter they ought to do. Thus in the following case it was decided that the Court of Queen's Bench will grant a writ of mandamus to enforce the fulfilment of a duty in which the plaintiff is personally interested where such duty is not in the nature of a mere personal contract; therefore, where a company incorporated by royal charter, and bound by their deed of settlement to keep a register of shareholders, and to enter on such register the names of the representatives of deceased shareholders, had refused so to do: Held, that the court had power to grant a writ of mandamus to compel such registration, it being a matter in which the plaintiff and the public are both interested. *Norris v. Irish Land Company*, 6 Week Rep. 55.

MASTER.—*References to—Matters of calculation—Common Law Procedure Act, 1852, s. 94—Amount due on judgment.*—The amount due on a judgment, deducting payments made and proved at the trial, or the amount due for costs on a contract to pay costs of suing, are "matters of calculation," which may be referred to the master to inquire. *The National Assurance Company v. Best*, 27 Law Journ. Ex. 19.

NEW TRIAL.—*Appeal—Misdirection.*—By s. 25 of the Common Law Procedure Act, 1854 (stated 1 Law Chron. 159), in all cases of motions for new trial on the ground that the judge has not ruled according to law, if the rule to show cause is refused, the party decided against may appeal, provided the court in its discretion think that an appeal should be allowed; provided, that where the application for a new trial is upon matter of discretion only, as on the ground that the verdict was against the weight of evidence, no appeal shall be allowed. Where a motion for a new trial has been made, not only on the ground that the verdict was against the weight of evidence, but also on the ground that the judge has not ruled according to law, the alleged misdirection being in not directing the jury to find a verdict for the party applying as to a certain part of the claim: if the rule is refused on the former ground, as to the weight of evidence, the judge certifying that he is not judicially dissatisfied with the verdict, and the point depends upon a question of fact, arising on the evidence, which he was not asked specifically to leave to the jury, an appeal will not be allowed. *Holden v. Mordach*, 27 Law Journ. Ex. 27.

NEW TRIAL.—*Appeal, right of* [vol. 1, p. 159; vol. 3, pp. 159, 264, 387]—*Rule dropping—Common*

Law Procedure Act, 1854, ss. 34, 35.—The 34th and 35th sections of the Common Law Procedure Act, 1854, give a right of appeal only in cases where "a rule has been refused, or, if granted, has then been discharged or made absolute" (see 1 Law Chron. 159). A rule which drops from the fact of the Court of Queen's Bench being equally divided is discharged within the meaning of the Common Law Procedure Act, 1854, ss. 34, 35, so as to give the party supporting the rule a right of appeal. *Levy v. Gree*, 6 Week. Rep. 209.

BANKRUPTCY.

ACT OF BANKRUPTCY.—*Bankrupt Law Consolidation Act, 1849 (12 & 13 Vic. c. 106, ss. 79, 223)—Adjudication of bankruptcy under the arrangement clauses—Relation to prior act of bankruptcy* [vol. 3, pp. 266, 271]—*Act of bankruptcy by petition.*—The 76th section of the Bankrupt Consolidation Act enacts, that the filing of a petition by a trader, under the arrangement clauses, "shall be accounted and adjudged conclusive evidence of an act of bankruptcy, provided a petition for adjudication shall be filed against him within two months after such petition for arrangement has been dismissed: provided, also, no adjudication shall be made until after such petition for arrangement has been dismissed." The 223rd section provides, that, where a trader does not appear, or file his accounts, the petition shall be dismissed; and, amongst other events, if the proposition, or a modification thereof, is not assented to at a public meeting, the Court of Bankruptcy shall adjourn to the public court, where they shall adjudge the trader to be a bankrupt. In the cases of *Stevenson v. Mewman* (22 L. J. C. P. 110) and *Nicholson v. Cooch* (25 Id. Q. B. 137), it was decided, that, on an adjudication founded on the above 223rd section, the title of the assignees does not relate back to any prior act of bankruptcy. In the following case, it appeared that the plaintiffs, traders, on the 26th of June, 1850, petitioned the Court of Bankruptcy for an arrangement under s. 211 of the Bankrupt Law Consolidation Act, 1849. At an adjourned private meeting, on the 6th of August, the plaintiffs did not attend; and neither the proposition, nor any modification thereof, was accepted by the creditors. The petition was not dismissed; but the meeting was adjourned to the public court, and the plaintiffs adjudicated bankrupt under s. 223, and assignees appointed. Between the petition for arrangement and the adjudication in bankruptcy, the plaintiffs assigned to D. a debt due to them from the defendant, of which the defendant had notice; but the defendant subsequently paid the debt to the assignees: Held, that the debt did not pass to the assignees—an adjudication of bankruptcy, under s. 223,

not having relation to any prior act of bankruptcy; and, consequently, that D. had a right to recover the debt in the name of the plaintiffs: Held, also, that the petition was not, under the circumstances, an act of bankruptcy under s. 76. *Monk v. Sharp*, 27 Law Journ. Ex. 29.

ACT OF BANKRUPTCY [*ante*, p. 57].—*Assignment of trader's stock and effects—Security for further advances—Fraudulent preference* [see First Book, pp. 216, 221].—The following statement will explain the decision referred to *ante*, p. 57:—An assignment, by a trader, of his stock in trade, fixtures, and effects (which, in fact, constitute his whole property), partly in consideration of an existing debt, and partly as security for a further advance, if *bonâ fide*, is not necessarily, and as a conclusion of law (apart from evidence of fraudulent preference), an act of bankruptcy; it not appearing that there is in the deed any power to take after-acquired property, as in the case of *Graham v. Chapman* (12 Com. Ben. Rep. 85; S. C. 21 L. J. Rep. C. P. 173); if there is any fraudulent intent, it is a question of fact for the jury. The fact that the debtor, being pressed for payment by one creditor, and being unable to pay him, went to another creditor, and, declaring that he must close his shop unless he could sell his stock, induced him to accept an assignment of his stock, partly for the debt already due to him, and partly for a fresh advance, do not constitute evidence of a fraudulent preference of such creditor, nor of any fraudulent intent, so as to invalidate the assignment, as against the creditors under a subsequent bankruptcy. *Bell v. Simpson*, 26 Law Journ. Ex. 363.

BILLS OF SALE.—*Registration—Fraud—Presumption—Order and disposition.*—The following case is important as to the effect of several bills of sale, some of them being unregistered and others registered:—A., a trader, on the 19th April, 1856, executed to the defendant C. a bill of sale of furniture on the premises where he was carrying on business for the alleged consideration of goods sold, money lent, and moneys for which C. had become responsible. The bill of sale, at the request of A., was not registered within twenty-one days; but on the 16th May another bill of sale, in similar terms, was executed by A. This was followed by a third on the 5th June, a fourth on the 24th June, a fifth on the 16th July, and a sixth on the 5th August, 1856, none of which were registered except the last. None of the bills of sale were cancelled. It was alleged by the bill, but denied by the answer, that, in July, 1856, A. committed an act of bankruptcy. He was, however, adjudicated a bankrupt in the December following. The plaintiffs, who were the assignees in bankruptcy, prayed for an injunction against the

defendant, and for a declaration that the bills of sale were fraudulent as against them. The defendant contended that the last bill of sale, which was registered, was a new transaction, and that the court must presume a cancellation of the preceding instruments: Held, that the court would not presume anything in favour of the defendant's title, which originated in a fraudulent bill of sale as against the plaintiffs; and that it was impossible to separate the last bill of sale from the first. It appearing also on the evidence that an act of bankruptcy was proved on the 19th July, the goods comprised in the bill of sale of the 5th August were held to be in the order and disposition of the bankrupt, and not in that of the defendant. *Stansfeld v. Cubitt*, 30 Law Tim. Rep. 218.

CHOICE OF ASSIGNEES.—*Right of manager of bank to vote by power of attorney.*—The manager of a joint-stock bank in Scotland, though not a shareholder, may vote by letter of attorney in the choice of assignees, under an English bankruptcy, in analogy to the ordinary practice as regards the public officer of a joint-stock bank in England. *Exp. Western Bank of Scotland, Re White*, 30 Law Tim. Rep. 178.

INSOLVENT.—*Removal of insolvents by creditors*—1 & 2 Vic. c. 110, s. 94.—*Country residents in London gaol.*—The Insolvent Debtors' Court, at the request of creditors, may order a prisoner to be removed from a London gaol to the gaol of the country in which he formerly resided, in order that he may be heard in the county court of the district where the body of the creditors reside. *Re Furze*, 30 Law Tim. Rep. 201.

INSOLVENT.—*Notice to foreign creditors—Fraud by appearances.*—The 1 & 2 Vic. c. 110, s. 71, providing for notice to the creditors, enacts "that the said Court for Relief of Insolvent Debtors shall cause notice of the making every such vesting order as aforesaid, and the filing of every such schedule, and of the time and place so as aforesaid appointed for such prisoners to be brought, to be given, by such means as the court shall direct, to the creditor or creditors at whose suit any such prisoner shall be detained in custody, or the attorney or agent of such creditor or creditors, and to the other creditors named in the schedule of such prisoner, and resident within the United Kingdom, and whose debts shall amount to the sum of £5, and to be inserted in the *London Gazette*, and also, if the said court shall think fit, in the *Edinburgh* and *Dublin Gazettes*, or either of them, and also in such other newspaper or newspapers as the said court shall direct." It has been held that the statute does not contemplate notice to foreign creditors. Debts may be contracted fraudu-

lently by false pretences without spoken words. *Re Levy*, 30 Law Tim. Rep. 235.

INSPECTION.—*Calls—Production of documents—Staying order peremptory for payment of call pending action.*—The plaintiff, in an action at law brought against the directors of a company which is being wound up in the Court of Bankruptcy, is entitled, as of right at common law, to inspect the books and papers of the company in the hands of the official liquidator. Where an action is pending, brought by a party whose name has been placed upon the list of contributors by the commissioner in bankruptcy for the purpose of disputing his liability on the ground of fraud and misrepresentation; and appeals are also waiting to be heard before the Court of Appeals, disputing *inter alia* the validity of a call made by the official liquidator, the commissioner will stay an order peremptory for payment of the call until after trial of the action and the hearing of the appeals. *Exp. Clark*, 30 Law Tim. Rep. 174.

OFFER OF COMPOSITION.—12 & 13 Vic. c. 106, s. 230 [vol. 2, p. 302].—An offer of composition, to be effectual under s. 230 of the Bankrupt Act (12 & 13 Vic. c. 106; 2 Law Chron. 302), must be made to all the creditors, and not confined to nine-tenths in number and value of the creditors who agree to accept the same (per Bramwell, B.). The offer must be to pay in money, not by bills. *Taylor v. Pearce*, 26 Law Journ. Ex. 371.

PARTING WITH PROPERTY.—*Within three months of the date of the petition.*—Where a petitioner has parted with any of his property (except for the necessary support of himself or his family, or the necessary expense of his petition, or in the ordinary course of trade), at any time within three months of the date of his petition, the petition will be dismissed. *Re Timson*, 30 Law Tim. Rep. 171.

PROOF.—*Equitable plea of proof in bankruptcy—Effect of splitting a debt.*—A creditor of a bankrupt may prove for a part of his debt, and give credit to the estate for another part for which he is secured by a policy; and a covenant by the bankrupt to pay the premiums on the policy as they become due, is a subsisting covenant to pay the premiums as they become due, after the debtor has been declared a bankrupt, and received his certificate. *Elder v. Beaumont*, 6 Week. Rep. 57.

PROTECTION.—*Jurisdiction—Residence.*—The places and periods of a petitioner's residence for six months preceding the duly granting of the petition, must be correctly set out in the petition, otherwise the court has no jurisdiction. *Re Gaydell*, 30 Law Tim. Rep. 172.

PUBLIC COMPANY.—*Joint-Stock Companies Act, 1856—Contributory register, what.*—The 16th section of the Joint-Stock Companies Act, 1856,

merely requires that a register of shareholders shall be kept by the company in one or more books in which certain particulars are to be entered, but no time was specified within which such register was to be made. By s. 19, every person who has accepted a share in a company registered under the act, and whose name is entered upon the register of shareholders, shall be deemed to be a shareholder. It has been decided by Mr. Com. Fonblanque that all parties who sign the memorandum of association of company are liable as contributories in respect of the number of shares placed opposite to their respective names therein. A register book, purporting to be a "draft register," of shareholders of a company in the form required by the Joint-Stock Companies Act, 1856, but made up by the secretary by order of the managing director of the company, and neither signed by a shareholder nor stamped with the seal of the company, is not a "register of shareholders" within the meaning of s. 16, so as to fix any party whose name appears there as a shareholder within the 19th section of the act. *Ogilvy's case*, 30 Law Tim. Rep. 178.

PUBLIC COMPANY.—*Joint-Stock Companies Act, 1856—Register of shareholders, what.*—A book, purporting to be a register of shareholders, which was made up by the solicitors of a company, by order of the board of directors, from papers and documents in the possession of the company after the establishment was broken up, and the company virtually defunct, is a register within the meaning of the 16th section of the Joint-Stock Companies Act, 1856, and the fact that there are mistakes and omissions of dates therein will not alter the case. Where a company had not provided any particular form for the acceptance of shares by the shareholders: Held, that the letter of application inclosing the bank's receipts for the deposit money, and upon expressing a willingness on the part of the applications to take the shares and pay the deposit and calls, &c., thereon, is a sufficient acceptance within Table B., Art. 1, of the Act of 1856. *Re Greenfield's case*, 30 Law Tim. Rep. 172.

PUBLIC COMPANY.—*Joint-Stock Company—Winding up—Jurisdiction of court to stay proceedings at law.*—Where a question of law is involved, and it is doubtful whether a debt sought to be recovered in an action at law is the debt of the company in process of being wound up in bankruptcy, or only of individuals, the court will not interfere in staying the action, under ss. 73 and 84 of the Joint-Stock Companies Act, 1856: *Semble*, the Court of Bankruptcy has no jurisdiction in such a case to stay the action: Held, also, that the court in such a case will not stay the proceedings in bankruptcy, under the winding-up order, until the action at law has

been tried and a verdict obtained. *Exp. Evans*, 30 Law Tim. Rep. 173.

TRADER-DEBTOR SUMMONS.—*Costs of where debt is paid.*—Where a trader is served with a writ in an action at law, and particulars of demand, under s. 78 of the Bankruptcy Act, 1849, and on the same day with a trader-debtor summons, and he pays the debt, the court will not require him to pay the costs of the summons for want of a reasonable time wherein to pay the debt; but he must pay the costs of the affidavit of debt, and the particulars of demand, that being a proceeding allowed by law. *Re* —, 30 Law Tim. Rep. 173.

CRIMINAL LAW.

INTERESTED JUSTICES.—*Appeal—Deputy recorder*—16 Geo. 2, c. 18.—An order made at the January sessions, 1857, by a deputy recorder, on the trial of an appeal by a water company, against a rate, was set aside, on the ground that the deputy recorder was an interested party, although he had sold his shares in the company, but the transfers had not been completed. The appeal was then heard at the June sessions before the recorder, and an order made reducing the rate, with costs. The parties not being able to settle the amount of costs, the matter was brought before the deputy recorder at the October sessions; and he having in the meantime completed the transfer of his shares in the water company, taxed the costs at £250, and made an order accordingly. It appeared, however, that the deputy recorder was rated to a parish which contributed with the respondent and other parishes to the common fund for the relief of the poor, but he was not rated to the parish where the property of the water company was situate, which was the subject of the appeal: Held, that, having an interest, though it might be very small, in the case, and the taxation of costs being a judicial act, the deputy recorder was incapacitated from acting in the appeal, and that the order adjudicating the costs was therefore bad. The 16 Geo. 2, c. 18, only enables justices to make original orders out of court respecting places in which they are rated, and does not give them any jurisdiction in the matters of appeals against orders relating to such places. *Reg. v. The Recorder of Cambridge*, 30 Law Tim. Rep. 164.

FALSE PRETENCES.—*Prosecutor induced to enter into a partnership, and to advance money as part of the capital of the concern.*—Upon the trial of an indictment for obtaining money by false pretences, it was proved that the prosecutor, upon the faith of certain representations made to him by the prisoner, entered into a partnership with him, and advanced money as part of the capital of the firm: Held, that, under these circumstances, a conviction

could not be sustained. *Reg. v. Watson*, 30 Law Tim. Rep. 171.

HABEAS CORPUS.—*Commitment—Vagrant act—Substitution of new warrant.*—Where a prisoner has been lodged in goal under a bad warrant of commitment, even in the nature of a conviction, (as, where the commitment is under the Vagrant Act, 5 Geo. 4, c. 83, s. 4), a good warrant of commitment, subsequently delivered to the gaoler, but before a rule for a *habeas corpus* has been obtained, is a good answer to that rule. *The Queen v. Richards* (26 Law Journ. M. C. 201) confirmed. And where a writ of *habeas corpus* was granted to bring up a prisoner convicted under the Vagrant Act, the commitment stating that he had frequented, &c., a public highway, not stating it to be "a place of public resort" or adjacent thereto, and the writ proved abortive, and then a new warrant was delivered to the gaoler, and subsequently a rule nisi was granted for another writ of *habeas corpus*: Held, that the fact of the second warrant, disclosed upon affidavit, as that warrant would have been a good return to the writ, was an answer to the rule, and the rule was accordingly discharged. *Exp. Cross*, 27 Law Journ. Ex. 40.

LARCENY.—*False pretence—Servant receiving from master as agent of another.*—Where a servant by a false pretence induces his master to give him a cheque, as agent of a creditor of his master, with the view of its being handed over to that creditor, and the servant appropriates the cheque to his own use, he cannot be indicted for stealing it. *The Queen v. Essex*, 27 Law Journ. M. C. 20.

QUARTER SESSIONS.—*Power to adjourn—Direction by statute to do act at next sessions—Table of fees.*—The provision of the statute 26 Geo. 2, c. 14, which requires that a table of fees shall be made at one quarter sessions, and shall be approved by the justices of the peace at the next succeeding quarter sessions, is not directory but imperative. Hence a table of fees was held to be void which was made at one sessions considered at the next sessions, and by that sessions adjourned to the third sessions, which approved it. *Bowman v. Blyth*, 27 Law Journ. M. C. 21.

EMBEZZLEMENT.—*By clerk to a savings bank—Property laid in trustees—Evidence of act of trustee—Larceny or false pretences.*—In an indictment for embezzlement by the clerk of a savings bank, the property was laid in A. B., and others. In order to prove that A. B. was a trustee, he was called as a witness, and stated that since the commission of the offence, he had been acting as a trustee, but that before that date he had attended only one meeting, having been requested to do so, lest there should be a deficiency of trustees, but he was also a manager, and

it did not appear that any act was done at that meeting which might not have been done by a manager as well as by a trustee: Held, insufficient evidence of acting to support the inference of a legal appointment as trustee. Upon an indictment for stealing a cheque, it was proved that the prisoner, being a clerk to a savings bank, received the cheque from a manager upon a false representation that one of the depositors had given notice of withdrawal, and for the purpose of handing it over to the depositor; it being found that, according to the usual course of business, if a depositor could not attend at the proper time to receive the cheque, it was handed to the prisoner as the agent of the depositor: Held, that the case was one of false pretences, and not larceny. *Reg. v. Essex*, 30 Law Tim. Rep. 171.

VENDORS AND PURCHASERS.

MISTAKE.—*Rectification—Compensation—Pleading—Rescinding contract after conveyance.*—After conveyance the omission of certain parcels, of which omission the purchaser had notice by the abstract: Held, not a ground for rescinding the contract. The purchaser having, by his mistake, allowed the vendor to convey the omitted parcels to another purchaser: Held, not entitled to have the conveyance rectified: Held, also, that a decree for compensation cannot be made after conveyance. *Quære*, whether, in such circumstances, a bill praying relief against another purchaser, and in the alternative against the vendor, is not demurrable. *Lentz v. Hillan*, 6 Week. Rep. 51.

ANNUITY.—*Consideration of purchase—To be secured by bond—No lien.*—An agreement to sell land, in consideration of an annuity of three lives "to be secured by bond:" Held, that the annuity was not a lien upon the land. *Dixon v. Gayfere*, 6 Week. Rep. 52.

RIGHT OF PRE-EMPTION.—*Construction—Laches—Time essence of contract* [vol. 3, p. 276].—If there is a contract to do anything, and then a separate contract that it shall be done within a given time, the court may give effect to the first where time is not of the essence of the contract; but if a person contracts to sell an estate for a given sum of money, to be paid on the 1st of January, if the money is tendered to him on the 2nd, that certainly would not be within the contract. Whatever difference there may be between the decisions of courts of equity and of common law in the construction of contracts as to time being of the essence of the contract (First Book, 207), there is no authority in the books that a court of equity will vary the terms in which a testator chooses to make a gift, or that it

will consider anything as an equivalent to conditions imposed by the testator. There may, indeed, be a distinction where the party is ready and willing to do his part, but is prevented by the act of the other party from doing it; but that is one of a different class of cases. In the following case, it appeared that a testator and his brother were seised of certain real estate as tenants in common, subject to a mortgage debt that they had both contracted. The testator, by his will, directed his trustees to convey his real estate to his brother for the sum of £2,500, provided the brother signified to the trustees his intention to accept the same within the space of one month from the testator's death, and paid the purchase-money within a further period of two months. His brother did signify to the trustees his intention to take the estate within the prescribed time, and his solicitor applied to the solicitor of the trustees to have an abstract of the title furnished him, but he allowed the further period of two months to elapse without paying or tendering the purchase-money. He afterwards alleged that he was not bound to pay it till he had an abstract of the title furnished to him, and a conveyance executed, and, moreover, that he had a right to have the incumbrances discharged, and the estate conveyed to him free: Held (affirming the decision of Wood, V. C.), that the right of pre-emption was lost, and that, under the circumstances, the trustees were not obliged to furnish an abstract. *Semble*, but if the trustees had been guilty of such laches as would have prevented the donee from performing the conditions imposed by the will, the court would have granted the relief. *Brook v. Garrod*, 30 Law Tim. Rep. 194.

NOTE.—As to the effect of the exercise of an option to purchase, see *ante*, pp. 206, 207.

PUBLIC COMPANY.—*Power to take lands—Infancy of owner—Title from occupation for sixty years at a rent—Determining value of land.*—A company incorporated by act of Parliament was empowered to take lands for the purposes of their act, and either to pay for them by a gross sum, or by a perpetual annual rent. In the case of incapacitated persons, thereby empowered to sell, the value was to be fixed by commissioners appointed by the Act. The company took certain lands of an infant, and an award was made by the commissioners fixing the gross value, or the annual rent to be paid. This award was, however, informal and invalid, though it did not appear that this fact was known. The company entered on the lands in 1797, and paid an annual rent, but not the sum fixed by the award, until 1826, when the company, having arranged to give up part of the land to the owner, an agreement was made between the agents as to the reduction to be

made in the rent; and in that document the whole rent was stated at the sum fixed by the commissioners award, and a deduction was made therefrom, and the reduced rent fixed accordingly, which rent has been paid from that time, by the company, to the successive owners of the land. The present owner having lately disputed the ownership of the company, and given them notice to deliver up possession of the land, and threatened an ejectment, the company filed their bill to establish their right to the land, and to have a conveyance: Held, upon the evidence, that the rent had not been paid upon the footing of the award from the date of the taking of the land by the company, to 1826, and that the calculation of the rent upon the basis of the award, in the agreement of the date, was a mistake on both sides, and was not an admission by the defendants that the company held the land at a perpetual rent under the provisions of the act; and that the company had not acquired a perfect title under the act, and was not entitled to a conveyance: but, held, that the land must be treated as having been taken by the company for the purposes of their act, and that on the principle of the case of the Duke of Beaufort v. Patrick (17 Beav. 60; 21 Law Tim. Rep. 296), the company were entitled to hold the land, and to perfect their title thereto. *The Somersetshire Coal Canal Company v. Harcourt*, 30 Law Tim. Rep. 194.

SPECIFIC PERFORMANCE.—*Decree*—*Title when first shown*—*Evidence of seisin*—*Sixty years' title*—*Search for will*—*Intestacy*—*Covenant to produce old deeds*—*Practice in chambers*—*Objections to clerks finding*.—The following case is one of great importance to conveyancers, and relates to various matters of frequent occurrence in practice. Vice-Chancellor Kindersley decided the following points—viz., 1. Where a title of more than sixty years commences with a will containing a general devise, and there is a subsequent deed of covenant by the devisee in fee to produce deeds of earlier date, that will and deed, coupled with continuous possession ever since, is sufficient evidence of seisin. 2. Where there is conclusive evidence of intestacy sufficient to satisfy the Court of Chancery of the fact, yet without search for a will, a purchaser is entitled to require such search. 3. Where earlier deeds are scheduled in a deed of covenant of sixty years old, a purchaser is entitled to simple inspection only of such earlier deeds. 4. Objections to chief clerk's finding as to title should be made and at once referred to the judge in chambers before certificate made, as the cheapest mode of deciding the question (*Parr v. Lovegrove*, 6 Week. Rep. 201). These points will be better understood from the following extract from the decision of the Vice-Chancellor:—"The questions involved in this discussion were in one sense

nominal; the decree was the ordinary one, such as was made every day, and yet now that there was a controversy, not a single authority was produced as to what was meant by 'when a good title was first shown.' He had never entertained any doubt whatever, that it signified, not only that the plaintiff could show a good title on the abstract and documents there set out, but could prove the truth of such statements. If on the face of the abstract, or what was tantamount to it a title of sixty years and upwards was shown, and it was manifest without evidence that (for instance) an individual died intestate, or leaving a son, or without issue, if it was alleged with sufficient specification, that was a good title, although the proof might be a future consideration. There was no decision showing that such was not the right view. There were two questions; first, whether a good title could be made out at all up to this time, and whether the chief clerk was not wrong in finding that it could be made; and, secondly, if it could, when it was first shown. It was suggested in a book of practice, to which his honour owed great obligations (*Dart on Vendors and Purchasers*, 195), that a title should commence with a deed, and not with a will containing a general devise; and that was true in one sense, because it was not consistent or desirable that it should so commence. But it was said that even a specific devise was not sufficient. There was no authority to show that the title must begin with a deed by which a fee simple was given to A. B. On the other hand, Lord St. Leonards had thought that a title might possibly begin without any deed: it therefore could not be contended, nor was it, that the title was bad on that ground; but the question was, whether there was sufficient evidence of seisin." *Parr v. Lovegrove*, 6 Week. Rep. 201.

SPECIFIC PERFORMANCE.—*Surrender of lease vested in another*—*Compensation* [vol. 3, p. 277].—In the case of *Nelthorpe v. Holgate* (1 Coll. 203), specific performance was decreed with a compensation for an outstanding life interest, which the vendor was unable to convey; there the vendor knew perfectly well of this outstanding life interest, but contracted to sell the whole estate, while the purchaser (who obtained specific performance with compensation) had no actual notice that any such outstanding interest existed. It is different where there appears to have been a common mistake on both sides, as the following decision will show. A. contracted to purchase a leasehold estate subject to an underlease, of which seven years were unexpired, to B.'s father. A. agreed with B., on having a surrender of this underlease, to grant him a new lease, and B. agreed to procure a surrender of the underlease from his father, and to accept such new lease. B.'s father

refused to surrender his underlease: Held, upon demurrer, that A. could not obtain specific performance of this agreement, there being no allegation that B. had professed himself legally competent to enforce a surrender; and the question as to compensation to A. being determinable by action at law for damages: Held, also, that B. could not be compelled to accept a lease in the terms proposed at the expiration of the underlease. *Beeston v. Stutely*, 6 Week. Rep. 206.

MISTAKE.—*As to parcels discovered after conveyance—Relief against vendor or purchaser of another lot.*—A fuller statement of the following case is given than that already furnished. The plaintiff contracted to purchase a leasehold house and stabling. The latter were not included in the same lease with the former, but formed part of the premises comprised in the lease of an adjoining house. The abstract delivered to the plaintiff did not show any title to the stabling, and he did not discover the mistake, and took an assignment of the house and premises comprised in the same lease. The stabling was assigned to the purchaser of the adjoining house: Held, that there was no ground for rescinding the contract: Held, also, that the plaintiff, having had notice by the abstract of the omission as to the parcels, and having allowed the vendor to assign part of the premises to another purchaser, was not entitled to have the conveyance rectified: Held, also, that after conveyance, a decree for compensation could not be made. There being nothing in the particulars to show that the stabling did not form part of the premises included in the adjoining lot, and the other purchaser having no notice that the plaintiff considered that he took a conveyance of these premises: Held, that the plaintiff had no title to relief against him. *Leuty v. Hillas*, 30 Law Tim. Rep. 229.

NOTE.—This case of *Leuty v. Hillas* has been taken by appeal to the Lord Chancellor, who has confirmed the decision of the M. R., that the plaintiff had no case against the vendor, but has overruled his decision as to the other purchaser of the stabling, giving relief against him. *Leuty v. Hillas*, 6 Week. Rep. 218.

LIEN FOR PURCHASE MONEY.—*Annuity granted—Whether a lien on the estate.*—An agreement was entered into for the sale of an estate, in consideration of an annuity to be granted to the vendor, for three lives, to be secured by bond, upon the estate being conveyed: Held (confirming the decision of the Master of the Rolls), that the vendor had no lien on the estate in respect of the annuity, and was only entitled to have it secured by bond. If a person sells an estate for a certain sum of money which is not paid, the vendor has a lien on the estate for the purchase money; and if he takes any other

security for the payment thereof, he still has such lien. *Secus*, in the case of an annuity. *Dixon v. Gayfer*, 30 Law Tim. Rep. 162; 6 Week. Rep. 52; *suprà*, tit. "Annuity."

THE DIVIDED PROFESSION.

In the *Jurist* of the present month, there is an article on two pamphlets of Mr. E. W. Field, in which this gentleman endeavours to keep open the old sore of the superior advantages conferred on the bar, by which he alleges an unjust monopoly is obtained to the prejudice of solicitors. The question is no doubt one of some interest to a few solicitors who think they could better perform the functions of a barrister; but we cannot conceive that the opinions of Mr. Field are likely to be generally adopted. In attacking the privileges of the bar, Mr. Field shows a little more energy, but very little discretion:—"Differing in this respect from every other occupation, the legal regulation of advocacy—if I may call that *legal* which is really above and outside all legal control—is placed in the hands of the great lawyers, and, as I have just said, is above all judicial and legislative control. Its members form a corporation or guild which govern the most important of all civil occupations by its own wisdom, or interests, or whims, or by a mixture of all three, and which, by regulations historically quite modern (some only a few years old), has entirely severed advocacy from the lower pursuits of the profession, and has done this so as effectually to debar any systematic addition to its own ranks from that source from which nature (the true guide in these matters), if left unrestricted, would have recruited them. Did a cobbler desire to go to the bar (and to the honour of the bar be it said that that supposition is not a fanciful one), he might be called to the bar three years after entering himself at one of the inns of court, continuing to work at his stall all the while. But if my learned and able friend now near me desired to be called to the bar, he must have been struck off the roll of attorneys, and have entirely and *bonâ fide* ceased to act either as a solicitor or in any of the other legal capacities mentioned in the recent rule of the four inns for three years. Three years is enough for a cobbler, who is all the while continuing his practice, to learn all the preliminary law necessary to his admission to the bar—three years' abstinence from practice and forgetfulness of his previous knowledge would be imposed upon my learned friend."

Mr. Field will be glad to learn that cobblers and attorneys are upon the same footing. Abstinence from the pursuit of any trade or business is in all

the inns a necessary condition to the keeping of terms.

Mr. Field then suggests two questions—first, “Is this exclusion of attorneys and solicitors expedient for the public?” And, secondly, “Is it expedient that the bar itself should be the legislature on such a subject, and have power, at its own simple will and *ipse dixit*, to exclude from the trade of advocacy any bodies of men whatever—most of all, to exclude those who more than all others would be most competent to enter into such trade in rivalry with themselves?”

“With the first of these two questions Mr. Bulmer’s paper deals, as far as it goes, very ably. It omits, however, to point out to the public (as I conceive we are bound to point out if we are to be outspoken on the subject) that the *inexpediency* of all such regulations is the leading doctrine of political economy, and that such regulations are opposed to that principle of ‘unrestricted competition,’ as one of our great statesmen calls it, which is in future, he says, to be the governing policy of this kingdom. Besides all monetary considerations turning on the fact that the present regulations constantly require two men to be employed on work that one would otherwise efficiently perform (the elucidation of which considerations would alone afford materials for a paper), the interest of the employer (the public) plainly is to have as large a labour market to choose its legal workmen out of as possible, and to get rid of every regulation which would prevent the removal of its labourers from one point of legal employment to another.”

“Moreover, such regulations prevent the legal workman from applying himself to that one particular branch of legal occupation to which, after trial and *upon experience*, he finds himself most fitted; and, on the contrary, they require him, before he has had any experience, to decide to which particular branch the whole of his future life shall be devoted. To the adoption of the opposite course the remarkable excellence of the American lawyers is to be attributed.”

Mr. Field has probably taken the American lawyers at their own estimate. No one who judges them by their text-books and reports will rate them highly. No doubt the Anglo-Saxon race in America is capable of contributing the same amount of talent to the legal profession that it does in England, but there are other outlets for ability there. The legal profession does not offer the same peculiar attractions to cultivated talent that it does here; and, whatever may be the cause, the law in the United States is very much less scientific and exact than it is here. America has produced few good treatises—scarcely one of remarkable excellence; and its

judicial precedents will not bear comparison with our own. But this is beside the question. Every American lawyer might be, as Mr. M. O’Connell has it, a *Lycurgus*, and yet not owe it to his attorney breeding.

The writer in the *Jurist* then makes the following observations, which merit some attention, though we cannot say we subscribe to all of them:—“The object of the institution of the bar is the conservation of the principles of the common law. This would be impossible in the hands of attorneys. Their minds, like those of other mortals, are subdued to what they work in. Their views are necessarily concrete; it is desirable that they should be so. An attorney, with the habits of mind which distinguish an accomplished counsel, would be unfit for his work. Each by proper training is fitted for his occupation. The cases are exceptional where either branch of the profession has been benefited by recruits from the other, and those recruits who have made good soldiers were drilled under the system Mr. Field would abolish. It is not worth while to stop to discriminate the intellectual characteristics which the two professions respectively require. There can be no doubt that of two minds, fresh from university training, and innocent of law or practice, one will be better fitted for the bar, the other for the office, and this independently of the gift of eloquence, which, though the most regarded, is, to the welfare of society, the least important gift. Suppose, however, that these blank minds are equally capable of winning distinction in either path—that both will inevitably distinguish themselves. It is easy, alas! to win distinction and wealth at the bar without discharging the sacred trust which is committed to the bar—to make use of the law without understanding, and consequently without respecting it. If our talented adventurer, after training for and trying attorney’s work, is dissatisfied with the work, or with the pay, or with the distinction, and is free at once to jump into the position of a counsel—to become one of the keepers of the country’s law (a large part of its conscience)—what days and nights are we to expect that this man, who has shown so little foresight, so little stability of character, will devote to the patient unremunerated investigation of the principles and worth of the law? “But don’t tell me,” says Mr. Field, “of the patient study of the law. Have I not seen note-books filled with caricatures—barristers who did not know the difference between a lease and an assignment?” No doubt the web of students and barristers is of as mixed a quality as that of articled clerks and attorneys. But we are to consider those who succeed, not those who fail in each branch. A man of ability and energy, by one mode of training, may become a

successful merchant, by another a successful attorney, by another a successful (and pernicious) Nisi Prius advocate. What is wanted for the lasting interests of society in the bar is a man who has patiently studied that which is worthy of patient study, and cannot be comprehended without it. The man may wear a wig and get money enough and honour enough—all he wants—without that study. Society demands more, and is wise and right in saying to the man of ability and energy, "If you wish to be trusted with this precious machine, which requires the undivided application of all your attention and industry for years to comprehend, you must give me security for that application—you must relinquish all other occupation." The man of energy, who, if he had a business, would neglect his books, being kept from business, is true to his character; he does not vegetate, but works to the desired end, and if the right stuff is in him becomes what he would never have become while on the attorneys' roll.

THE EXAMINATIONS.

The subjects of the preliminary and final examinations of articulated clerks are receiving that attention which they merit, and we only hope that in their zeal some individuals may not be using their positions for the purposes of unduly increasing the difficulties of candidates by making the proposed examinations a means of keeping the profession closed for the benefit of those already within its fold.

We have to report, that, on the 12th of January, a deputation from the Metropolitan and Provincial Law Association had an interview with the council of the Incorporated Law Society upon the subject of improving the education of solicitors.

The deputation consisted of Mr. Field and Mr. Bower, of London; Mr. Banner, of Liverpool; Mr. Ryland, of Birmingham; and the secretary and assistant secretary of the Association.

Mr. Cookson, of London, and Mr. J. Hope Shaw, of Leeds, would also have been members of the deputation if they had not occupied seats upon the council.

Mr. Field, after referring to the active interest which had always been taken by the Metropolitan and Provincial Law Association upon this matter, and to the various steps which they had taken, especially since the year 1853, to urge upon the council the adoption of various measures which had been recommended by all the more active of the Provincial Law Societies, stated that the committee had sought the present interview in obedience to

instructions they had received at the recent aggregate meeting of the profession at Manchester. He then referred to a passage upon the subject in the last annual report of the council, which led the committee now to hope that there was no longer any great difference of opinion upon the subject.

The committee, however, desire to urge upon the council the importance of taking immediate steps to introduce certain specific improvements, which he proceeded to state as follows:—

1. That a preliminary examination should be instituted in certain subjects of general education, in respect to which the committee only wished to suggest the addition of the English language to those enumerated in the last annual report of the council—viz., English history, geography, the Latin and French languages, arithmetic, and book-keeping. This examination must of course, as intimated in the report of the council, be so arranged as not to render it necessary for the candidates to attend in London.

2. The committee were strongly of opinion that this preliminary examination should take place before articles, believing that if it were postponed it could never be made as real and efficient as it ought to be, and would not effect its main object of excluding from the profession improper candidates for admission.

3. Upon the subject of professional education, the committee urged the expediency of adopting the course, which was followed by almost every other examining body, of giving notice beforehand that the examinations in the different subjects would be founded upon certain specified text-books.

4. The committee urged that the examinations would be very much more useful, and very much less likely to encourage the system of cramming, if articulated clerks were permitted to present themselves for examination from time to time during their articles in any of the necessary subjects in which they might feel prepared to be examined, instead of being compelled as now to pass through one examination in all the different subjects at the same time.

5. The committee further suggested that the system which had recently been adopted by the council of giving honours to a small number of the most distinguished candidates, should be extended by an additional division of the whole number of candidates into two classes; the first to contain those who passed well, and the second those who barely passed.

This was one of the suggestions originally made by the committee in 1853, and the committee felt convinced that it would afford a valuable motive for increased exertion to a much larger proportion

of the candidates than would ever be influenced by merely offering a small number of prizes.

Mr. Field urged that some of these objects, especially the last two, could be adopted at once by the council under the powers they already possessed; and that if the council were willing to apply to Parliament for such an extension of their powers as would enable them also to adopt the other suggestions, it would be perfectly easy to obtain for such an application the cordial concurrence of all the active provincial law societies, an opinion which was fully confirmed by Mr. Ryland and Mr. Banner, as well as by Mr. Hope Shaw.

The whole of these suggestions were carefully and very fully discussed. The council, of course, did not express any collective opinion upon the subject; but the impression left upon every member of the deputation was, that the council was prepared at once cordially and actively to take steps for the adoption of, at all events, the substance of all that had been suggested.

In connection with the above, we may call attention to the following letter which we have been requested to insert, but we are not to be considered as approving of all the suggestions made by the writer:—

"This subject has been so fully discussed in all its bearings, that there remains apparently but little more to be said about it; yet there is one view, and I think a new one, which I would submit to the consideration of your numerous readers. It is this: firstly, that examination should take place *after admission*, instead of *previous to articleship*; secondly, that it should be *voluntary*; and, thirdly, that *degrees* should be conferred, as at the universities, for successful attempts.

"The first proposition, if carried out, would entirely do away with the filtering system by which clerks, who have not had the advantage of a liberal, or rather classical education, and who, by a course of industry and application, have fitted themselves for an honourable profession, the duties of which they are perfectly competent to fulfil, would be excluded for not possessing a knowledge of Latin, Greek, &c., which is of little more practical use to a lawyer (or even to any one except the man who makes letters his profession) than preparing the mind for future efforts. This is not the only advantage; for what could be the object of 'cramming' a boy who has had little previous education but to get him into a good business; and what criterion would it be for a youth fresh from Harrow, or any other public school, in thorough mental training, and accustomed to get up any amount of work in a given time, to pass through a preparatory examination?

"But for the sake of argument, let us suppose such a ceremony established. What would it effect? The successful 'crammer,' and the youth fresh from school, would be admitted to articles. But would any advantage over the old system be obtained? and is a little 'Latin and less Greek' what is wanted to make a clever lawyer? Certainly not! Application and perseverance are the things needful, and whoever possesses these qualities need never despair of rising in his profession. Not that a classical and liberal education is to be despised, by no means, but still it is not indispensable to the acquirement and comprehension of law as practised by solicitors in England.

"As to my second proposition, I would have the examination voluntary—that is to say, any one who gave in his name after admission might take part in it. The subject should be Greek, Latin, French, German, &c., with certain text-books, with which each candidate must be thoroughly acquainted. The details and general management of the whole could be left to the examiners.

"Thirdly, the rewards for a successful examination in all branches should be certain degrees, to be determined previously by competent persons, or any society—the Incorporated Law Society for instance—who might have the direction of it.

"The advantage of honours over mere book-prizes is so palpable, that I will not trouble your readers with any further discussion on the subject.

"In conclusion, I think that this plan, if properly carried out, would produce beneficial results; for the chance of getting an honourable degree would be dependent on passing a good law examination; so that, if I may use the expression, 'Two birds would be killed with one stone.'"

L. P. H.

NOTICES OF NEW BOOKS.

HORSEY ON PROBATES AND ADMINISTRATIONS.

The Probate and Administration Act, 1857, with the Rules and Orders of the Court of Probate. Also, the Instructions to the Principal and District Registrars, and a Summary of the Law of Executors and Administrators in reference to Probates and Administrations. Second edition. By GEORGE HORSEY, Esq., of Gray's Inn, Barrister-at-Law; Lecturer's Prizeman, &c. 10s. London: Shaw and Sons.

A very short time, indeed, has elapsed since we noticed the first edition of this work, and we now find that the whole of that edition was very speedily exhausted, and a new one called for—which plainly shows that Mr. Horsey's labours were duly appreciated. As, however, the work was incomplete without the then shortly-expected rules and orders, we

think the author exercised a wise discretion in delaying the publication of the second edition until he could add them. It is not at any time a very easy task to produce an intelligible work where the materials themselves are simple; and much less so when, as in the present case, the materials are anything but simple. We are sure that any practitioners who may attempt to get on with the official copies of the act and new rules and orders, will soon find themselves involved in inextricable confusion, and will be glad to avail themselves of such assistance as Mr. Horsey's book affords. Having so fully and so recently noticed the work, it will be unnecessary to do more than refer to the additions. These consist of the new rules and orders, which are not only given in *extenso*, by way of appendix, but are also incorporated in the body of the work—thus enabling the reader to ascertain at a glance what the law and practice are. We notice that Mr. Horsey has placed *hearings* to the various rules and orders, which makes them more easy of reference and more readily understood. Indeed, this alone is a great improvement over the official copies, in which the reader cannot hope to find what he wants without much trouble; whereas, in Mr. Horsey's appendix the particular rule sought for may (independently of the index) be speedily found. In addition to this feature, an abstract of the rules and orders and lists of the terms appear in the table of contents, so that the practitioner cannot fail to discover everything in the work. The index, too, has been considerably enlarged, and its arrangement improved. On examining the work, we discover that Mr. Horsey has extended his labours to that portion of the volume which contains the "summary of the law of executors and administrators," and that he has made many additions thereto. In fact, it appears to us that the author has felt constrained by the approbation shown of his work in the speedy sale of the first edition, to make it as perfect as possible; and we have little doubt that the work will become a standard one, as it is evidently not intended to be, what some others are, a mere ephemeral production to meet the expected demand arising from the creation of a new tribunal.

COOTE'S PROBATE COURT.

The Common Form Practice of the Court of Probate in Granting Probates and Letters of Administration, with the New Act (20 & 21 Vic. c. 77); also the Rules, Orders, and Instructions in respect of Non-Contentious Business as well as Contentious Business; together with the Official Table of Fees, &c., as issued 9th January, 1858. By HENRY CHARLES COOTE, Proctor in Doctors' Commons, Author of "The

Practice of the Ecclesiastical Courts." London: Butterworths. 13s.

THE above comprehensive title might almost be left to explain the nature of the work; but, conformably with custom, we will notice its contents more fully: Chap. 1 treats of the "Constitution and Jurisdiction of the Court of Probate." Chap. 2 of "General Grants," including the following: Sec. 1, Probates; Sec. 2, Letters of Administration, with the Will annexed; Sec. 3, Incorporation of Papers by Reference, &c., Affidavits in Proof of Will; Sec. 4, Letters of Administration; Sec. 5, Presumptive Proof of Death; Sec. 6, Commorientes; Sec. 7, Doctrine of Priority; Sec. 8, Renunciation, Consent, and Retraction; Sec. 9, Joint Grants; Sec. 10, Right of the Court to select an Administrator. Chap. 3 treats of "Limited Grants," including the following subjects: Sec. 1, Grants limited in Duration; Sec. 2, Grants for the use and benefit, "Jus habentium;" Sec. 3, Limited Probates; Sec. 4, Limited Administrations, with the Will annexed; Sec. 5, Limited Administrations; Sec. 6, Grants, save and except; Sec. 7, Grants "Cæterorum." Chap. 4 comprises "Grants de bonis non." Chap. 5, "Second or Supplemental Grants." Chap. 6, "Alterations in Grants." Chap. 7, "Revocations of Grants." These occupy about 200 pages of the work, and then follows an appendix of nearly 200 more pages, containing the new Act and the new Rules and Orders.

The work is written by a gentleman who is the author of a treatise on the practice of the Ecclesiastical courts, and is himself a proctor, and who, in addition, states that he has received the assistance of a friend in the late Prerogative Court well versed in the minutiae of practical details. Such advantages certainly lead to the supposition that Mr. Coote is qualified to instruct his less favoured co-practitioners; but we fear that some of them will feel disappointed that such great qualifications for giving practical information have not produced something more really serviceable. We take it that the great requirement of the profession at this time, with reference to the business thus newly opened to them, is some practical work, such as the works of Impey and Archbold with reference to the common law, by the aid of which any ordinary practitioner could safely and comfortably execute all the various proceedings relating to probates and administrations. We by no means say that Mr. Coote has not produced a good work, and very possibly he could have furnished just such a work as that referred to by us as a desideratum, but may have forborne to do it for reasons not very difficult to divine. It is somewhat natural for proctors to be unwilling to reveal the "secrets of the prison-house" to their now rivals, the "general practitioners."

It is utterly impossible for us to give the reader a just notion of the work by any lengthened description, and we must, therefore, have recourse to extracts, as being the most likely plan by which this may be accomplished. For our purpose we select Sec. 8 of Chap. 2. This section treats of "*Renunciation, Consent, and Retraction.*"

"*Renunciation.*—Renunciation is the act whereby a person having a superior interest or right to probate or administration, waives and abandons it. It must be made absolutely and without reserve; and to be effective, it must be admitted and recorded (*Long and Feaver v. Symes and Hannam*, 3 Hagg. E. R. 776). But it takes effect from the day of its date (*Munday and Berry v. Slaughter*, 2 Curt. 72), although recorded later. It is then permanent; and if not retracted, can be acted upon and referred to in all succeeding grants (*Harrison v. Harrison*, *Robertson*, vol. 1, p. 406; 4 Notes of Cases, p. 454, and *infra*). No second renunciation is required (*Ibid.*), nor is it necessary to cite the renouncing party. Except in the case of executorship, it does not bind the representatives of the renouncing party. Renunciation may be made by proxy or by appearing personally, in *curia*—i. e., before a surrogate. In the latter case, if the renouncing be an executor, he takes an oath that he has not intermeddled, and will not intermeddle in the goods of the testator.

"*By an executor.*—The executor may renounce probate at once, and his renunciation will be admitted, provided it be accompanied by the original will (*M. Fenton*, 8 Add. 35). If he be a residuary legatee in trust, or residuary legatee also, he must renounce administration (will) also in these further characters. A residuary legatee, if there be no executor, may renounce and file the will at the same time. An executor in renouncing probate of his own testator's will, renounces by implication the execution of any will of which the former may have been executor, and of all other wills comprehended in the chain. An executor cannot renounce probate of the first will, and take probate of the second one (*J. Perry*, 2 Curt. 655). The renunciation of executorship, which is an office, binds the representatives of the executor (*Ibid.*).

"*By a legal personal representative.*—An executor or an administrator, with the will annexed, or an administrator, may renounce the administration, with the will annexed, or administration, which he would be entitled to take in such his representative capacity. And such renunciation will be a sufficient waiver, to admit other interests to administration, if the renunciant be the sole representative of his own deceased. If there be another qualified representative, the latter must renounce also. Where the acting (or proving) executor was cited,

but could not be served personally with the process, the court, under these circumstances, directed the renunciation of his co-executor (*viz.*, of the probate and execution of his own testator's will) to be procured, before it would make a grant in default of the other. Power had been reserved to such co-executor, but he had not proved. It would seem that the renunciation of the proving or acting executor would have been sufficient, if he had not abated, and could have been personally served, as in that case his refusal would have been perfect (*Sarah Leach*, deceased, 14th May, 1857. By Sir John Dodson).

"*By all the persons interested in the estate.*—If there is no legal personal representative of the deceased person on whose behalf, or in whose name, a renunciation is desired, all persons having an interest in his estate must renounce. Under such circumstances, in the case of a will, the residuary legatee must renounce as well as the executor; and in the case of an intestacy, all the next of kin, and all the persons entitled in distribution, must renounce.

"*By a feme covert.*—Where a wife renounces, her husband must, to perfect it, join in her renunciation; otherwise he must be cited (*Wm. Augustus Jaques*, 5 Notes of Cases, p. 295).

"*Executor intermeddling.*—If an executor has intermeddled in the deceased's estate, on the fact being proved, the court will not admit his renunciation (*Long v. Symes*, 3 Hagg. 774; *M'Donnell v. Prendergast*, 3 Hagg. 214; *Jackson and Wallington v. Whitehead*, 3 Phill. 579; *Rayner v. Green*, 2 Curt. 249; *Munday and Berry v. Slaughter*, 2 Curt. 76). On no other ground can he be precluded from renouncing (*Jackson and Wallington v. Whitehead*, 3 Phill. 579). The rule of the civil law is *semel hæres, semper hæres*.

"*By guardian.*—A minor, or an infant, may renounce by his guardian, appointed by the court for that purpose. A testamentary guardian of an infant or minor renounces on behalf of his ward, and has a preferable right to do so over the other guardian. The guardian, appointed by the Court of Chancery, of the estate of an infant, may renounce on his behalf. A mother will be appointed guardian by the court to renounce, on behalf of the child or children with which she is *encharge* at the moment (*John Wilmshurst*, August, 1830).

"*By committee.*—A committee of a lunatic, or person of unsound mind, may, on his behalf, renounce probate or administration.

"*Renunciation by non-appearance to citation.*—The non-appearance of a party, having a superior interest to a citation, if personally served with such process, is equivalent to a renunciation, and is equally binding

upon him, and effective (Vide Coote's 'Ecclesiastical Practice,' p. 764). The rule of the civil law is 'Si citatus aliquis non compareat, habetur pro consentiente' (Mascard de Prob. vol. 3, p. 253).

"*Renunciation dispensed with.*—One of an intestate's next of kin, being a convicted felon and transported during his natural life, was not required to renounce. (Joseph Lawrence, deceased, June, 1825).

"*Consent.*—In certain cases, as we have seen, a renunciation must be accompanied by a consent; in others, a consent alone is required, to lead a grant to a person of an inferior interest. If a leading grant belong to two persons, one of whom only is inclined to take the further grant, his renunciation and consent will enable his co-partner to take it alone.

"*Retraction.*—Under certain conditions, a renunciant is allowed by the court to retract his renunciation, being held not to be bound by his waiver for all time. But this state of the law appears now to be abrogated, as regards the executor. By the 79th section of the new act, it is enacted, that 'where any person, after the commencement of the act, renounces probate of the will of which he is appointed executor, or one of the executors, the rights of such person, in respect of the executorship, shall wholly cease, and the representation to the testator, and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor.' The effect of this enactment is not only to give to the proving executor the right of transmission by survivorship, but to debar the renunciant executor from retracting his renunciation *quâ* executor. There is nothing, however, to prevent his retracting his renunciation *quâ* residuary legatee, if he has renounced in that character also, and taking administration (with the will annexed) *de bonis non*. If administration, with the will annexed, has been granted to a legatee or creditor, on the renunciation of the residuary legatee, he is allowed, upon the death of the administrator, to retract his renunciation and take administration (will) *de bonis non*, though opposed (e.g., by a creditor: *Dimes v. Cornwell and Lyon*, 7 Notes of Cases, p. 381). And so in the case of a simple administration granted to a person entitled in distribution, or to a creditor, on the renunciation of the next of kin, the latter may, on the administrator's death, retract and take administration *de bonis non* (*Skeffington v. White*, 1 Hagg. E. R. 702). In all cases of renunciation, save in that of an executorship, on the death of the renunciant his representative may take a grant to the same deceased, without retraction, for a renun-

ation, except in the case of executorship, does not bind representatives (*Thos. Newton Penny*, 1 Robertson, 426). But the retracting party may only take administration in the form in which it was originally granted, particularly if a consent on his part has accompanied the renunciation. So, where on the next of kin renouncing and consenting, administration was granted to a creditor for the use of the widow during her lunacy, the court would not, on the death of the administrator, allow one of the next of kin who retracted to take an absolute grant of administration *de bonis*, but gave him one limited as before. The renunciant may retract before administration has passed the seal, unless the circumstances be such as to justify the court in refusing to allow such retraction. In one case the court, where the next of kin had renounced, in order that a creditor might take, and one of them applied to be allowed to retract before administration passed the seal, refused to permit it, and held them to their renunciation (*West and Smith v. Willby*, 3 Phill. 374). Refusal, shown by non-appearance to a citation, requires no retraction. The party so refusing may, on the death of the administrator, come in and take a grant *de bonis non*. He is, however, subject to precisely the same rules which regulate a retraction, and has no more privileges than the person who has renounced in form."

The reader will now be able to judge whether Mr. Coote's work is one which supplies the kind of information wanted by practitioners under present circumstances, or how far it is the best yet produced: for though it may not come up to the required minutiae of information, it does not follow that it may not be preferable to other productions. From an examination of the work, we are enabled to say that Mr. Coote has done what he professes to have undertaken in a satisfactory manner, and we are certain that the volume will be of essential service to the bewildered practitioner.

OLD AND NEW JUDGES.

The advent of Mr. Serjeant Byles to the bench of the Court of Common Pleas, in the place of Mr. Justice Cresswell (now the judge of the New Probate and Divorce Court), has been accompanied by the death of a retired judge, Mr. Justice Maule. A notice of these distinguished personages may not be unacceptable to our readers.

Mr. Justice Maule was senior wrangler, first Smith's prizeman, and fellow of Trinity College, Cambridge. He began his career at the bar with a great reputation. That reputation he fully main-

tained both there and on the bench, to which he was raised in 1839.

Mr. Justice Maule was, perhaps, one of the most remarkable men of his time. Living much in seclusion, a court of justice was the only arena in which to study his character. Nevertheless, it is curious that no man had a higher reputation for solid and extensive learning of every sort, for wise and pungent sayings, for sarcastic humour, for searching acuteness, or for unbiassed impartiality. He could tell the best story, quote from the most out-of-the-way authors, discuss with equal ability a question of mathematics, a question of law, or, more singular still, one of scholastic theology. If he desired to rebuke a tedious counsel, or to expose a foolish law, he did so with a keen delicacy of humour worthy of Charles Lamb. Confident in his genius for sarcasm, he ventured sometimes to rebuke even the vagaries of his brethren who sat on the bench by his side. Confident in his acuteness of intellect and profound knowledge of law, he would sometimes play with a counsel, or lead astray for a time even the chief of his own court. As was once said of him, he was like a man throwing stones into a canal, and bidding his Newfoundland go in to fetch them. It was no use attempting to cajole such a judge. His intellect inspired too much respect. Except, perhaps, Sydney Smith and Lord Melbourne, there was no one about whom so many good stories were current.

As a magistrate, his merits were his impartiality, his knowledge of law, and his strong sense. There were occasions, undoubtedly, when dignity and decorum might have been better provided for: but Mr. Justice Maule's capacity as a lawyer was unquestioned. His capacity to keep his mind clear of prejudice, and to see the facts as they really stood, was unequalled. In his time there have been cases enough in which his political opinions and his private views must have been involved: nevertheless, it will be found that he has sometimes supported views diametrically opposed to both. In the O'Connell case he gave judgment against O'Connell: in the Braintree case he gave judgment for the legality of the church-rate. Indeed, it was impossible to see that man in court, huddled together on his seat, with his pallid face, ample forehead, aquiline nose, piercing eyes, and singularly heavy mouth, while his emaciated fingers held the 'pen, and his tongue expressed, in broken sentences, his view of the argument as it proceeded, without feeling satisfied that he cared not a jot for the plaintiff or the defendant as individuals—that he was thoroughly purged of all prejudice. His duty was to see how the facts stood, to settle the data of the problem, to lay down the proposition of law to be applied, and to apply it accordingly. To that duty, accordingly, he reli-

giously applied himself. Mr. Justice Maule was a strictly impartial magistrate.

But this eminent person was more. He was a thoroughly accomplished lawyer, keenly acute. Above all, he was remarkable for good sense. There are few subtle lawyers who are not given to supersubtlety. They cannot resist the temptation of a logical puzzle. If two views can be taken of any set of facts, or of any rule of law, they will adopt that which gives the most startling result. They glory in the saying that hard cases make bad law, and delight to construe the facts or to strain a rule of law so as to make as many hard cases as possible. They seem to have a passion for technical injustice. They take pleasure in shocking the uninitiated. This is, indeed, a pretty ambition, which is sometimes dearly paid for. It has cost one eminent living lawyer the pain of seeing a whole system of procedure which he had invented utterly demolished. Now, Mr. Justice Maule had no such weak ambition. He took no pleasure in the triumph of legal logic over common sense. He applied his surpassing acuteness, not to establish distinctions, but to reconcile them; to harmonise discordant propositions; to make the result to the litigants consistent not only with strict law, but with the dictates of common sense. With all the learning of the most technical lawyer, Mr. Justice Maule was in addition a sensible man.

We now pass to the newly made judge—now Mr. Justice Byles—of whose appointment the *Daily News* has thus spoken:—"The elevation of Mr. Serjeant Byles to the bench will probably be viewed with some dissatisfaction by those who consider that judicial appointments, though not made with exclusive reference to political opinions, should yet not be made with absolute disregard to them. The political opinions of the new judge, though never displayed in the House of Commons, are tolerably notorious. Mr. Serjeant Byles was not only a Tory, but a Protectionist. In the days of the Derby ascendancy he recorded his economical views in the form of a pamphlet, which became for a time the recognised manifesto of the party. The 'Sophisms of Free-trade' was a powerful refutation of fallacies which the experience of the last ten years has demonstrated to be truths—an argumentative exposition of truths which the same unerring test has demonstrated to be fallacies. It would be unfair to be too hard on the learned lawyer. He had wandered beyond the limits of his craft, and, like many other acute persons in the same predicament, displayed more enterprise than wisdom. His logic was correct enough, but his knowledge was imperfect; his deductions were all legitimate, but his premises were all wrong. It was a sufficiently natural result. The

sagacious jurist, the acute nisi prius advocate, trusted to others for his facts, and relied on himself for his reasonings. That he should have chosen to dogmatise on a complicated science, of which he had not time to study the grounds, may have been an impeachment on his modesty; but modesty is not the most indispensable of virtues to the British barrister. That he was wrong in all his views and preposterous in all his predictions is a misfortune which he shared with too many other eminent persons on the same side in politics, to make it a fair topic of peculiar reproach. The economist came to grief, but the lawyer prospered, and the rapid extension of a professional practice, already very considerable, more than atoned for the discredit of many theories, and the downfall of many vaticinations.

"Yes; there can be no doubt upon the matter. The new judge is not only with the Liberal party, but is, or rather has been, strenuously opposed to it. Are we, on that ground, opposed to the appointment? Most unquestionably not. In all these cases there is one, and only one, question to be asked with a view of forming a correct opinion as to the nature of the selection. Who, in the general estimate of the legal profession, would be the fittest man for the post, apart from all political considerations? This is the fair test. In that gregarious and quick-sighted brotherhood, a man's merits and capacities are rapidly and accurately assessed. Professional jealousies and exaggerated self-esteem may blind some, but the general judgment of Westminster Hall, the common voice of the long-robed populace, rarely errs. Tried by this test, the choice of the new judge has been a right choice. If Mr. Serjeant Byles had been passed over, the general feeling, we think, would have been, 'Ah, Byles no doubt would have been the best man; but then his politics, you know, put him out of the question.'

"We think it much to Lord Cranworth's credit that he has not allowed this gentleman's politics to put him out of the question. The occasions on which we have had to remonstrate against Lord Cranworth's want of energy as a law reformer have been only too frequent; but we have always recognised that conscientious desire to select the best man, which has honourably distinguished his higher legal appointments. A firm adherence to the principle that professional fitness, and not political opinions, ought to form the guide in judicial appointments of all kinds is especially valuable in the present day, when the legal patronage vested in the Chancellor is so enormously increased by the recent creation of subordinate judgeships. In a free country few possessions are more valuable than the thorough independence of that profession which has been, and again may be, intrusted with the defence of en-

dangered liberty against the encroachments of irritated power. Once proclaim and act upon the principle that judicial office, high or low, shall be the prize of political subserviency or parliamentary adhesion, and the independence of the bar is at an end. Instead of a body of free-spirited advocates, you have a crowd of expectant place-men. The tendency of the times, the necessities of our increasing population, and the growing demand for a more certain and scientific administration of justice—all point to the probability of a still further increase of judicial offices and a corresponding extension of the legal patronage of the Crown. The same circumstances conspire to give an additional value to such appointments as those of Mr. Serjeant Byles. Whether he will make a good judge time alone can show; to venture a prediction on this point is at least as hazardous as to attempt the confessedly hopeless task of estimating the chances of an unacted play. But this is certain; the new judge has a professional reputation for sagacity, good sense, and sound judgment, not surpassed by that of any other practitioner in Westminster Hall. If the possession of these qualities by an advocate do not constitute a guarantee for excellence as a judge, nothing will."

NOTICE TO THE PROFESSION.

In consequence of Messrs. W. G. Benning and Co. having relinquished business, Messrs. Shaw and Sons, Fetter-lane, have become the publishers of the following two of the works of Mr. WORDSWORTH, Q. C., viz.:—*THE LAW OF BANKING, INSURANCE, AND GENERAL JOINT STOCK COMPANIES*, 6th edition, and *THE LAW OF PATENTS FOR INVENTIONS*, 2nd edition.

Fetter-lane, January, 1858.

Arbitration [vol. 3, pp. 22, 225, 386]—*Common Law Procedure Act, 1854, ss. 3 and 6* [vol. 1, p. 157]—*Matters of mere account—Duty of referee—Fraud.*—It is the duty of the judge, referring a matter in dispute under ss. 3 and 6 of the Common Law Procedure Act, 1854, to ascertain that it is a proper matter to be referred under those sections. But when he has referred it to the master, the master is to inquire into it without considering whether or not it is matter of mere account. And therefore where a reference was made by a judge under s. 3 to the master, and before the master a question arose as to whether a receipt produced was obtained by fraud, and he refused to go into such question: Held, that he was wrong. *Insull v. Moojeen*, 6 Week. Rep. 126.

COPYRIGHT IN WORKS OF ART

We take the following from a report prepared at the request of the committee appointed by the Society of Arts to consider the legal bearing of the artistic copyright question, and drawn up by Mr. D. R. Blaine, Barrister-at-Law, and which contains information which may be useful to our readers, and will form a supplement to the necessarily short statement in the First Book, p. 200, and moreover is not readily accessible in any other shape. The legal part is what our readers are most immediately concerned with, and this is treated of under the following heads:—1, As to any common law rights; 2, The statute law rights; 3, The British International Copyright Laws—

I. *As to the common law right.*—By the common law of England no copyright or protection exists in favour of works of art, except to this limited extent—namely, that while they remain *unpublished*, without the consent of the artist or owner, no one can lawfully publish them without such consent. This principle has become established by analogy with a long series of decisions, chiefly as to literary productions. Thus, where her Majesty the Queen and the Prince Consort had made several etchings, and impressions thereof were taken for their private use, and not for publication; impressions of these etchings having been obtained by surreptitious means, and the parties in possession thereof being about to publish the same, the Court of Chancery, upon a bill filed by the Prince, restrained the defendants from publishing the etchings, or any catalogue thereof. The Lord Chancellor, Lord Cottenham, upon that occasion, said:—"The *property* in an author or composer of any work, whether of literature, art, or science, such work being *unpublished*, and kept for his private use or pleasure, cannot be disputed after the many decisions in which that proposition has been affirmed or assumed." His lordship at the same time held that the exclusive right of the author in *unpublished* works depends entirely on the common law right of property therein. In a more recent case, decided in the House of Lords, upon a question of musical copyright, Lord St. Leonards also said:—"The common law does give a man who has composed a work a right to that composition, just as he has a right to any other part of his personal property; but the question of the right of excluding all the world from copying, and of himself claiming the exclusive right of for ever copying his own composition *after he has published it* to the world, is a totally different thing." His lordship also held that no common law right exists after publication. It was formerly held by Lord Mansfield, and other eminent judges, that the authors of literary works

had, by the common law, a copyright in their works *after* publication, and consequently that such copyright was perpetual; but that doctrine was long since overruled by the House of Lords, in the celebrated case of *Donaldson v. Beckett* (see *Jeffreys v. Boosey*, 4 Ho. Lords, 815; 1 L. C. 126; First Book, 199). The result is, that the common law affords artists no protection whatever against the piracy of their works *after* the publication thereof by public exhibition, and that they are consequently dependent for the very slender and imperfect protection they do enjoy for any copyright in such works, upon

II. *The statute laws of artistic copyright.*—These laws may be classed in the following divisions:—1. The Engraving Copyright Acts; 2. The Sculpture Copyright Acts; 3. The British International Copyright Acts; 4. The Conventions and Orders in Council founded thereon. The British Engraving Copyright Acts are:—1. The 8 Geo. 2, c. 18, 1735; 2. The 7 Geo. 3, c. 88, 1767; 3. The 17 Geo. 3, c. 57, 1777; 4. The 6 & 7 Will. 4. c. 59, 1836; 5. The 15 Vic. c. 12, s. 14, 1852.

The chief defects of these Engraving Copyright Acts are—I. That they give artists no copyright in their pictures, *as such*, but only for the purposes of engraving. II. They afford no protection to the purchasers of original pictures against the piracy thereof. III. They afford the public no protection against the purchase of spurious pictures, and thus operate as an encouragement to the grossest acts of fraud. IV. That architects are quite unprotected in respect of their published designs, unless engraved before publication. V. That the new art of photography is also entirely unprotected as respects copyright. VI. That the existing acts only extend to Great Britain and Ireland. VII. That the term of twenty-eight years' copyright is insufficient. VIII. The expense attendant upon the assignment of copyright by deed. IX. And the expense attendant upon proceedings for the protection of copyrights.

I. That the existing acts give artists no copyright in pictures, *as such*, but only for the purpose of engraving, will be fully understood when it is seen that, according to Hogarth's Act, a picture is only treated as a *design* for the purpose of engraving from. Both for fame and profit, Hogarth appears to have relied upon his original art, rather than that of a painter; it was his *engravings* that were pirated, and his act was therefore framed to meet the requirements of his own case and those of other artists similarly placed. Some of the chief mischiefs to which this state of the law exposes an artist are as follow:—1. After he has sold his picture he has no means of preventing its piracy, either as a picture, or for the purposes of engraving, excepting as between himself and the

person to whom he has sold it. Contracts are often made by artists with the purchasers of their pictures, by which contracts the engraving copyright is secured to the artist. Such contracts are constantly avoided by the purchaser selling the picture to a third person without notice of the artist's contract as to the copyright. He is thus defrauded of his property, and his fame as an artist is exposed to serious injury. 2. Unless a picture be engraved, and the impressions published as Hogarth's Act directs, before such picture be publicly exhibited, no copyright can, in my opinion, be acquired even in the *design* of the picture for the purposes of engraving; it is for ever lost to the artist. 3. And by depriving an artist of any copyright in the design of his work, unless it be thus engraved before exhibition, he is denuded of an inducement to devote himself to those higher classes of pictures which require the greatest amount of thought and time in their composition—the best interests of art are thus damaged.

II. The fact of the Engraving Acts affording no protection against the piracy of pictures is a mischief which affects the purchaser as well as the artist. Much of the *conventional* value of a picture depends upon its being *unique*. If protected against piracy, purchasers of pictures would have a further inducement given them to add to their collections, and they would buy with a confidence which is now impossible.

III. These acts likewise afford the public no protection against the purchase of *spurious* works, and thus afford direct encouragement to the grossest acts of fraud. This committee will doubtless be furnished with numerous instances of those frauds which have long been so extensively practised upon artists and the public in respect to pictures. In the meantime, I will only mention the recent decision of the Queen v. Closs (*ante*, p. 238). In that case a picture had been painted by Mr. Linnell, who signed and sold it for £180. The prisoner was a picture-dealer, and was indicted for fraudulently selling a copy of Linnell's picture as and for the genuine picture which he had painted. Mr. Linnell's name was likewise painted on such copy, which the prisoner sold for £130. The indictment contained three counts: the first charged the prisoner with obtaining money under false pretences, but upon this count he was acquitted; the second count charged him with a *cheat* at common law, by means of writing Linnell's name upon the copy; and the third count charged the prisoner with a *cheat* by way of forgery of Linnell's name upon the copy. Upon these last two counts the prisoner was convicted; but his counsel objecting that these counts disclosed no indictable offence at common law, the judgment was respited in order that the

opinion of the Criminal Court of Appeal might be taken upon the objection so raised on the part of the prisoner. The case was afterwards argued before five judges, who formed such Court of Appeal, and they unanimously held that the conviction of the prisoner was *wrong*; that there was no *forgery*; and that "a forgery must be of some document or writing, and Linnell's name in this case must be looked at merely as in the nature of an arbitrary mark made by the master to identify his own work." As to the second count of the indictment the court held that the conviction could not be sustained, because it did not sufficiently show that the prisoner sold the copy *by means* of Linnell's signature being forged upon it. The consequences of this decision as respects the interests of artists, of the purchasers of works of art, and the public morality, are too apparent to need any comment.

IV. Architects are entirely unprotected, in respect of their published designs, unless they engrave or lithograph, and publish them as Hogarth's Act directs; in which event it would be an act of piracy to copy them for publication without the consent of the proprietor of the copyright.

V. The new art of photography is likewise entirely unprotected as respects copyright. Whatever may be the expense which has been incurred, and although the artist's name may be placed upon his works, any one may copy them, at any time *after* their publication, to the serious injury of the fame and profit of the original artist.

VI. The existing Engraving Copyright Acts only extend to Great Britain and Ireland, and do not include the colonial, or any other portion of the British dominions, nor even the Isle of Man, or the Channel Islands; these acts being expressly confined to such prints as have been "engraved, etched, drawn or designed in any part of Great Britain or Ireland." If so engraved, &c., out of the United Kingdom, it appears that no copyright can be acquired under the acts in question. Thus where a bill was filed in Chancery to restrain the piracy of certain prints forming part of a book, which prints had been designed and engraved abroad, and only *published* with the book in England, the court held that the plain object of the Legislature was to protect those works only which had been *executed* in Great Britain (or Ireland), and not those which were only published there.

VII. The term of twenty-eight years' copyright granted by the Engraving Acts is too short. I have already stated that these acts were framed upon the statutes relating to literary copyright works, in which the term was originally fourteen years, but was afterwards increased to twenty-

eight. In 1842, that term was by the Literary Copyright Amendment Act extended to a certain term of forty-two years, with the chance of a longer period, according to the author's life. The designers of maps, charts, and plans are included in that protection. As, therefore, Parliament has conceded the principle that the *property* in books, music, maps, charts, and plans shall be protected from piracy during a certain period of forty-two years, is it just to exclude the property of artists in their productions from a similar advantage?

VIII. The expense attendant upon the assignment of an artistic copyright is a serious defect. Under the existing acts, no *valid* transfer of such a right can be made by the owner, except by deed signed by him, attested by two witnesses, and stamped with the proper *ad valorem* duty on the price of the copyright, if sold. An assignment by deed was formerly requisite for assigning literary copyrights; but the Literary Copyright Amendment Act of 1842 remedied that defect as to books, music, maps, charts, and plans, by enabling the proprietor of the copyright to transfer it by entry in the register at Stationers' Hall, or by deed. The generally received opinion amongst engravers, printsellers, and auctioneers of artistic property, that the *copyright* in a plate passes with the sale and *delivery* of such plate is entirely fallacious, as the purchaser would find to his cost if he brought an action in his own name for the infringement of the copyright, without having obtained an assignment of it by deed, attested by two witnesses.

IX. The expense attendant upon the requisite proceedings for the protection of a copyright in cases of piracy is a most serious defect under the existing acts; it is, however, a defect which is alike applicable to the whole body of our statute law affecting copyrights of all descriptions. Even in the most flagrant instances of piracy, the proprietor of the copyright has no remedy against the pirate, except by an action at law for an injunction and damages, or a suit in Chancery for an injunction and account. The power recently given to the courts of common law to grant injunctions is a great boon to the proprietors of copyright, where their means, or the value of the copyright at stake, are such as to warrant their embarking in a lawsuit in one of the superior courts. All the legislation which has taken place upon the subject of copyright in England has proceeded upon the just theory that an author or artist has a *property* in his work. Where, therefore, a copyright work is *literally* copied, or copied with merely colourable alterations, it seems difficult to distinguish the moral guilt of such a theft from that of picking a pocket, and

consequently that such an act of piracy ought to be punishable as a *criminal* offence.

The British Sculpture Copyright Acts are:—1. The 39 Geo. 3, c. 71, 1798; 2. The 54 Geo. 3, c. 56, 1814; 3. The 14 Vic. c. 104, ss. 6, 7, 1850.

The defects of the acts relating to copyright in works of sculpture appear to be almost as important and numerous as those I have mentioned with respect to the Engraving Copyright Acts. The second, third, sixth, eighth, and ninth are applicable as well to the former as to the latter of these Acts, and I will therefore not repeat them. In addition, the following may be noticed:—I. The *certain* term of fourteen years' copyright is insufficient. II. A sculptor can acquire no copyright in his works for purposes of engraving. III. It seems doubtful whether a work of sculpture can be protected under the Designs Act without the performance of two sets of conditions. IV. The works of sculpture are most frequently pirated by a class of persons against whom the existing laws afford a useless remedy.

I. The *certain* term of fourteen years' copyright is insufficient. It is only extended to twenty-eight years if the sculptor outlives the first fourteen after the publication of his work. The interests of his *family* are lost sight of in this arrangement, and that the present term of copyright allowed for works of sculpture is insufficient surely must be admitted when it is remembered that twenty-eight years are conceded for engravings, and forty-two years *certain* for books, music, maps, charts, and plans. Sculptors have likewise a strong claim to an extended term of copyright, from the peculiar nature of their works. It frequently happens that a sketch is made of a statue which is not commissioned for many years afterwards. Now, to insure his copyright in such sketch, or first model, it seems that the artist must place his name and date upon it when he first publishes or exhibits it. The first fourteen years' copyright runs from that day, and may therefore expire before the work has been executed upon an enlarged scale, and consequently when so executed it would be entitled to no copyright.

II. A sculptor can acquire no copyright in his works for the purposes of *engraving*; a painter may. If well designed and engraved, the copyright in a sculptor's works might be profitable to him in various ways; on the other hand, if they are badly designed and engraved, his professional reputation may be injured with those who have not had an opportunity of examining his works.

III. It seems doubtful whether a work of sculpture can be protected under the Designs Act, without the performance of the *conditions* I have noticed

as being imposed under the Engraving Copyright Acts; and also those under the Designs Act, because the latter only extends to such works of sculpture as are "within the protection of the Sculpture Copyright Acts;" and no work can be brought within such protection without the performance of the conditions imposed by those Acts.

IV. The works of sculptors are most frequently pirated by a class of persons against whom the existing laws afford a useless remedy. These persons are generally indigent Italians, and other aliens, wholly unable to pay any costs or penalties which might be recovered against them. How defective the present Sculpture Copyright Acts are in this respect may be judged of by the fact that only *one* reported case arising under these acts is to be found. The instances of piracy are constant; but sculptors have wisely submitted to the invasion of their rights rather than embark in litigation with men of straw.

III. *The British international copyright laws.*—These laws consist of—1. The act of 7 Vic. c. 12, 1844; 2. The 15 Vic. c. 12, 1852; 3. And the various conventions and orders in council made under the above acts. Before entering upon any notice of these acts, &c., it seems desirable to state, that by the law of England, as it existed prior to the passing of any International Copyright Act, no copyright could be acquired in the British dominions in respect of any literary or other work which had not been either *first* published there, or simultaneously with its first publication in any other state. The consequence of this principle of our laws of copyright was to deprive *aliens*, as well as British subjects, of any copyright in their works in every case where they were first published in any foreign state.

1. This injustice to the rights of intellect was at length partially removed for the first time in 1838. The act then passed was repealed in 1844, by the 7 Vic. c. 12, which enables her Majesty, by order in council, to direct, as to books and *works of art*, which shall be first published in any foreign country, to be named in such order, that the authors of such books and works of art, and their assigns, shall have the privilege of copyright therein to be stated in the order in council, not exceeding that to which authors of similar works first published in the United Kingdom are entitled; but no such order was to have any effect, unless it states that *reciprocal* protection has been secured by the foreign power, to be named in such order, in favour of British copyright works. By this act, the benefits of, amongst others, the British Engraving and Sculpture Copyright Acts are extended, and apply to such of the works named in the orders in council as such acts shall be applicable to; but no such international copyright was to be acquired, unless the work in respect of which it is

claimed shall have been *registered* at Stationers' Hall within the period to be specified in the order in council.

2. In 1852, the 15 Vic. c. 12 was passed, which recognises a copyright convention then made by her Majesty with France, and extended the Engraving Copyright Acts "to prints taken by lithography, &c."

3. All the international copyright conventions which have been entered into by the British Government stipulate "that no person shall be entitled to such protection as aforesaid, unless he shall have duly complied with the laws and regulations of the respective countries in regard to the work in respect of which such protection may be claimed." This stipulation applies to all descriptions of copyright works included in the conventions.

International copyright conventions have been entered into by her Majesty with the *eleven* following States; and in pursuance of the powers contained in the above-mentioned acts, orders in council have also been issued in accordance with such acts and conventions.—

	Population.
1. With Prussia, in 1846 and 1855	17,302,881
2. Saxony, in 1846	2,989,075
3. Brunswick, in 1847	269,218
4. The Thuringian Union, in 1847	958,941
5. Hanover, in 1847	1,819,777
6. Oldenburg, in 1847	187,168
7. France, in 1851, 86,089,864; Colonies, 8,506,218	89,545,582
8. Anhalt-Dessau-Coethen, and Anhalt-Bern- bourg, in 1858	168,825
9. Hamburgh, in 1858	216,881
10. Belgium, in 1854	4,580,228
11. Spain, in 1857, 14,162,219; Colonies, 4,628,688	18,690,852

Total population of these States 85,628,818

It is a portion of the prerogative of the Crown to enter into conventions with foreign states. All those entered into by her Majesty, as to international copyright, expressly stipulate that from the date when such convention "shall come into operation, the authors of works of literature or of art, to whom the laws of either of the two countries do now or may hereafter give the right of *property* or copyright, shall be entitled to exercise that right in the territories of the other of such countries for the same term, and to the same extent, as the authors of works of the same nature, if published in such other country, would therein be entitled to such right, so that the republication or piracy in either country of any work of literature or of art, published in the other, shall be dealt with in the same manner as the republication or piracy of a

work of the same nature first published in such other country; and so that such authors in the one country shall have the same remedies before the courts of justice in the other country, and shall enjoy in that other country the same protection against piracy and unauthorised republication, as the law now does or may hereafter grant to authors in that country." Also, that the terms "works of literature or of art," employed as above, "shall be understood to comprise publications of books, of dramatic works, of musical compositions, of drawing, of painting, of sculpture, of engraving, of lithography, and of any other works whatsoever of literature and of the fine arts."

All the orders in council founded on these conventions also recite that a treaty has been concluded between her Majesty and the Sovereign of the foreign state named therein, "whereby due protection has been secured within (such foreign state) for the benefit of authors of books, dramatic pieces, musical compositions, drawings, paintings, articles of sculpture, engravings, lithographs, and any other works of literature and of the fine arts, in which the laws of Great Britain and of (such foreign state) do now or may hereafter give their respective subjects the right of property or of copyright."

MUTUAL CORRESPONDING SOCIETY.

Our readers will remember, that we have frequently called their attention to this Society, which may be said to have had its origin in the proposition made by Mr. E. Witchell, of Stroud, many years ago, and since carried out through our publications, of a system of mutual correspondence. We are sure, that those of our subscribers who have regularly kept up a correspondence have experienced great benefit from it, and so far they are more indebted to the real originator than to us. It will be well remembered, too, that Mr. Cordes, through our pages, proposed to influence the examiners so as to induce them to offer prizes and studentships, and that, at great expense and trouble, he exerted himself to get up petitions to Parliament; and though not successful, we have no doubt that the examiners were indirectly influenced by these active proceedings. In these ways the views of articled clerks have been brought before the profession, and have been made known to the examiners. Of course, these are such delicate matters, affecting not only articled clerks, but that body who formerly were clerks but, having passed through the probation, are now solicitors, having interests of a somewhat modified character, that it is desirable that some degree of modesty should be used by articled

clerks in bringing their views before the profession, who may in some degree be looked on as their superiors. So long as *suggestions* merely are made, there appears to be no cause of offence, even to the examiners; but how far any more active proceedings might be beneficial may be doubted. This leads us to observe, that the announced meeting (*ante*, p. xxv) of the Mutual Corresponding Society took place at the time and place before mentioned. Not having been favoured with any information respecting the meeting, we can only state what we find elsewhere, and thence we learn that, after the wants of nature had been fully satisfied, Mr. Pankhurst, of Manchester, read an essay upon "The Educational Requirements in relation to the Study of the Law," which is said to have been listened to throughout with the greatest interest and attention. Mr. Pankhurst divided his subject under the following heads: viz.—Preliminary studies in relation to that of the law: 1st. Language; 2nd. Logic; 3rd. Rhetoric; 4th. Mental philosophy—Suggestions in regard to the Preliminary examination—Political philosophy—Social science—the Amendment of the law—and, lastly, our Prospects.

Mr. OWEN, of Huddersfield, then brought forward a resolution, which was in the following words:—"That the most effectual plan to prevent ignorant and dishonourable persons from entering the profession to which we aspire is for the articled clerks of the present day to raise the standard of moral excellence, intellectual attainments, and legal proficiency, by their own diligence, perseverance, and upright conduct." Mr. Owen urged upon the meeting the want of education among the profession at the present day, which he considered was the cause of the number of disreputable persons now practising as attorneys and solicitors, and the only way in his opinion to keep such persons out of the ranks of the profession was embodied in the words of his resolution. He concluded by drawing a forcible picture of the low standard of education *necessary* at the present day.

The resolution was briefly seconded by Mr. JACOBS, of Hull.

Mr. ELLIS said, he regretted he was under the necessity of opposing this resolution, so purely theoretical, and quite incapable of being carried out. Moreover, as it would clash with a plan which he had to submit to the meeting, and which he believed was generally approved, he could not permit this resolution to pass unnoticed. The resolution said, the *most effectual* plan to keep unfit persons out of the profession was for all articled clerks to become fit. This, of course, was a self-evident truism. But, unfortunately, articled clerks would not do so. He begged to move, as an amendment, that the words,

"one of the most effectual plans," be substituted for "the most effectual plan." Thus it would not oppose the plan which he intended to submit as the only effectual one.

The amendment was seconded by Mr. PANKHURST. An animated discussion took place upon it. The Chairman then put the amendment, which was carried by a large majority.

Mr. ELLIS then rose to bring forward his resolution, which was in substance as follows:—

"That this meeting considers the only effectual plan to keep unfit persons out of the profession is an examination preliminary to articles, for the purpose of testing the education of the candidate; that this meeting further thinks that it would be a great boon to the profession and the country at large, if the heavy tax now imposed on the profession of a solicitor were abolished, and for it the proposed examination were substituted.

"That this meeting is of opinion that such examination should be preliminary to articles: First, because, were it not, it would, as to the clerks now under articles, cause the rejection of many of them who would never have entered into articles had they been aware of it, and would thus have avoided waste of time and money. Secondly, as to persons hereafter to be articulated, it should also be preliminary to articles, to give them an opportunity of testing their fitness before they expend both time and money.

"That a copy of this resolution be sent to the secretary of the Incorporated Law Society, with a respectful request for its consideration."

This resolution spoke for itself, and required but few remarks. Mr. Owen had ably shown the want of education in articulated clerks. Here was a means practicable and simple for insuring that requisite. Some years back there was not even a legal examination; money was the only requisite. The consequence was, that the profession was infested with unfit persons, and thus got a bad name. Look at the change now! This he attributed to two things: first, the progress of education; secondly, the legal examination. If this were so, we should endeavour to make use of these facts, and, by insuring a good education, still more improve the profession. After remarking upon the unfairness of the tax, the speaker then went on to say: "Let the tax be abolished, and the examination instituted, and we should see a change." As to its being preliminary, that was a delicate matter for articulated clerks to say anything about. It might not matter to those present whether they had to undergo it or not, but they must remember there were many to whom it was of vast importance.

Mr. HALL seconded the resolution.

A discussion took place upon it by Messrs. Pank-

hurst, Owen, and others; after which it was put to the meeting and carried.

Mr. BARKER, of London, then rose to move the following resolution, viz.:—

"That it is desirable and necessary for law students to gain a good knowledge of the principles of *pleading*, and for that purpose, in addition to the discussion of ordinary moot points, the members of this society be invited to send to the secretary such statements and copies, &c., as would be naturally laid before counsel as instructions for drawing declaration or pleas, and that such statements, &c., be circulated as at present among the various sections of the society; and that the member who first receives such paper shall draw the declaration or pleas, as the case may require; and that the other members amend same and advise thereon, making such remarks upon the practice and principles of pleading involved in the particular case under consideration as they shall think fit; such discussion papers to make two or more rounds of the section, and then to be transmitted to the secretary, and by him preserved as at present."

Mr. BARKER contended that a knowledge of pleading was requisite for every solicitor.

Mr. ELLIS seconded the resolution. He said he did not mean to advocate a nice knowledge of pleading, but a general acquaintance with its principles.

Mr. WALKER rose to oppose the resolution. He thought that it would be unnecessary for country law students, however useful it might be to the London law students.

Mr. JACOBS, of Hull, seconded the amendment. He considered the resolution impracticable. The resolution was carried by a large majority.

Mr. JACOBS then moved the following resolution:—

"That this meeting has read with much pleasure the recommendation addressed by the Metropolitan and Provincial Law Association to the Incorporated Law Society on the subject of education of solicitors at the interview of the 12th January last.

"That, the recommendation numbered five (*ante*, p. 282) being such a one as can at once be carried out by the Incorporated Law Society, this meeting entertains a strong conviction of its value and importance, and would respectfully urge the early consideration of it upon the society, with a view to its speedy adoption.

"That the secretary be requested to forward a copy of the above resolution to the secretary of the Incorporated Law Society."

BIRMINGHAM LAW STUDENTS' SOCIETY.

The annual meeting of the members of this association was held on Wednesday evening last, at the Hen and Chickens Hotel. Mr. Arthur Ryland presided, and there were also present Professor F. Johnson, Messrs. Balden, Matthews, Harris, Chirm, Saunders, Marigold, Allanby, and Brown (solicitors and honorary members), and Messrs. Harding, Warden, Potts, Horton (honorary secretary), Fox, Jelf, Milward, Canning, Taylor, and Phillips.—The chairman opened the proceedings in a practical and interesting address. Alluding to the increase in the number of members since the commencement, he said that what was of much greater importance than numbers was the position of the society, its action, and the honourable distinction which some of the members had achieved. He congratulated the society on the appointment of Mr. Johnson to the Professorship of Law at Queen's College, as he believed they all regarded that gentleman as a most suitable successor to Mr. Kennedy. He rejoiced to find that two other gentlemen had occupied honourable positions in the last admission examinations of the Incorporated Law Society; Mr. Edward Balden having gained the first prize, and Mr. C. Swinden having been awarded a certificate of merit. The importance of the society had been generally acknowledged, and he (Mr. Ryland) felt that they deserved the thanks of the profession for what they had done. He recommended the society to trace the satisfactory results of their labours to their true causes—namely, the practice of reading and discussing selected portions of the best text books, and the selection of questions for debate having reference to their daily studies and daily office employments. Mr. Ryland then proceeded to point out the importance of such societies: first, in reference to their effect in preparing their members for examination admissions—then in promoting fair and honourable, as well as skilful and enlightened, practice; and further, in improving and maintaining the status of attorneys and solicitors as a profession. In reference to the admission examinations he considered them important, as tending to make their members students, instead of mere readers; and observed on the importance of laying hold of principles which Mr. Helps called "the best results of study," the "reward of a student's labour." He had recently attended a conference between the Metropolitan and Provincial Law Society, and the Incorporated Law Society, on the subject of examinations. At that conference was urged the expediency of founding the examinations upon certain specified text books, and giving notice beforehand what those books should be; and this suggestion, if adopted, would give an

increased value and importance to such societies as theirs, which would grow into a necessary institution for articulated clerks. After dwelling at some length on the anomalous relation of attorneys to the bar, Mr. Ryland remarked upon the effect of early association in studies in producing mutual respect and regard, which would remain with them through life, and prove of great value in their future anxieties and toils of business, both to the practitioners and the clients. In conclusion, Mr. Ryland observed that to every class in the body politic possessing peculiar powers for the public weal, there attached the imperative duty of exercising those powers as circumstances might require—and no class possessed more important powers than did that to which they belonged; whilst he would not encourage them to neglect the nearer duties to their families or their clients, he urged them not to be content with mere lawyer's work, but seriously to consider on the threshold of life, before their spirits were blighted by the love of gold, or dulled by the technicalities of professionalism, what were the principal duties attaching to them as attorneys, and having recognised them, resolutely, habitually, and faithfully to do them. He warned them against the too common practice of excluding from their view all duties beyond the office which brought no fees and no thanks, and exhorted them early to learn the lesson which Scrogg's Ghost was sent to teach, that each should feel "the common welfare is my business," and so avoid that wretched ghost's miserable punishment of "seeking to interfere for good in human matters when he had lost the power for ever." In their future career many would be the opportunities of bringing to the aid of excellent public institutions the knowledge and ability in public business for which lawyers were generally distinguished, and many the occasions, both in the private circle and in the arena of public business, when a lawyer's knowledge and appreciation of the laws of evidence might protect character from unfounded aspersions; and their knowledge and experience might often be brought to bear in the amendment of the law; and not unfrequently might the principles of our little understood, yet glorious constitution, require a lawyer's knowledge for its maintenance against the insidious assaults which were often made by the proceedings of heedless or indolent Government officials, against the ignorant sneers of the thoughtless, or the unscrupulous doings of those who valued the rewards of the worldly great more than the approval of the patriot; and when they were thus called to bring their offerings to the public treasury, he hoped, for their sake and for the sake of the country, they would be found ready with willing hearts and vigorous hands.—The report, which was of a highly

satisfactory nature, was then read by Mr. Horton, the honorary secretary, and unanimously adopted, and the following gentlemen were appointed the committee for the ensuing year:—Professor Johnson, Messrs. Balden, Marigold, Horton, Fereday, Milward, Ansell, Hodgson, and Phillips.—The proceedings terminated with a vote of thanks to the chairman.

T. HORTON, Hon. Sec.

SUMMARY OF DECISIONS.

CONVEYANCING AND EQUITY.

ADVANCEMENT.—*Purchase of commission*—*Failure of purchase*—*Recal of sum advanced*.—A sum of money was advanced by trustees under a power of advancement for the purchase of a commission for a minor. The minor joined his regiment, and obtained two months' leave of absence to settle his affairs, which were greatly involved. Being unable to obtain further leave of absence, and being apprehensive of an arrest, he sold his commission: Held, that the purchase having been made by way of advancement, and there being no fraud, the minor was entitled to the proceeds of the sale of his commission as against the trustees, who claimed to recal the money. *Lawrie v. Bankes*, 6 Week. Rep. 244.

ADVANCEMENT.—*Joint purchase*—*Presumption*—*Reputed wife*.—In the following case a question was raised whether a purchase of stock by a testator in the name of himself and his reputed wife could be deemed to be an advancement on her behalf. It was contended that the rule as to advancements was founded upon intention only, and having been extended from legitimate to illegitimate children, that the court would infer a benefit in favour of a reputed as well as a lawful wife. With respect to the case of a purchase in the name of the wife the authorities are very few. There are two early cases of *Kingdon v. Bridges* (2 Vern. 67); and *Christ's Hospital v. Budgin* (2 Vern. 683). In *Grey v. Grey* (2 Swanst. App. 594), a case from Lord Nottingham's MSS., a purchase by a father in the name of his son was held to be an advancement. That learned judge observed: "Generally, and *prima facie* as they say, a purchase in the name of a stranger is a trust for want of consideration, but a purchase in the name of a son is no trust, for the consideration is apparent," &c. There was great analogy to the doctrine of the common law as to a resulting use to the feoffor upon a feoffment to a stranger without consideration, but that the consideration of blood settled the use in the son, and made it an advancement, Lord Nottingham further observing, "How can a court of equity justify itself to the world if it should be so arbitrary as to make

the law of trusts to differ from the law of uses in the same case." The case of an illegitimate child is not so clear. The doctrine of presuming an advancement had been extended to illegitimate children, from the person making the advancement having placed himself *in loco parentis*, so as to raise the presumption that he intended to provide for the maintenance of the child. Returning now to the position of a wife, and to the cases above alluded to, it may be observed, that in *Kingdon v. Bridges* (2 Vern. 67), it was held that as the wife cannot be a trustee for a husband, the inference of a trust was at once repelled, and that the wife surviving took for her own benefit. In *Christ's Hospital v. Budgin* (2 Vern. 683), it seemed to have come within the principle of supposed affection. The position of the wife therefore was plain and well defined, and so was that of a child, and a purchase in its name by any person placing himself *in loco parentis* was taken to be an advancement for such child. These observations will explain the following case and decision:—A. went through the form of marriage with B., his deceased wife's sister, subsequently to 1835, and lived with her as his wife; from time to time he purchased stock in the joint names of himself and his (reputed) wife. Upon the question as to whether this stock formed part of A.'s estate at the time of his death, or belonged to B.: Held, that the court would not presume an intention to benefit the reputed wife (as in the case of a lawful wife), but that the onus rested upon B. of showing that the stock had been given to her, and did not form part of A.'s estate. *Soar v. Foster*, 6 Week. Rep. 265.

COPYRIGHT.—*Agreement*—"Every edition"—*Right to publish subsequent and cheaper editions*—*Whether partnership between author and publisher*.—In the following case, Vice-Chancellor Wood made some remarks as to the loose way in which agreements between publishers and authors are drawn up, and the consequent litigation to which they give rise. He further observed that such agreements assumed a considerable variety of forms, but there were one or two forms which were sufficiently clear and explicit. One was the assignment of a copyright which left no uncertainty between the author and publisher; and the other was given in the case of *Sweet v. Cator* (11 Sim. 578). By these the rights were on each side equally defined, so as to give full effect to the rights of both. The following case was of an intermediate character, something like the case of *Stevens v. Benning*, (1 Kay and J. 176; 6 De G. M. and G. 223), though there was rather more precision and particularity, and the author had not sold or professed to sell, or part with any interest in the copyright. It was something more than a simple

agency—it was a share in a risk. The facts were as follow:—By an agreement between R. and B., B. agreed at his own expense and risk to publish a work entitled “P. W.,” and after deducting from the produce of the sales thereof the charges for printing, paper, advertisements, embellishments, and other incidental expenses, including ten per cent. on the gross amount of the sale for commission and risk of bad debts, the profits remaining of every edition that should be printed to be divided in equal parts between R. and B. B. published the work at 10s. 6d., and afterwards, without R.’s sanction, another edition at 8s. 6d. B. afterwards proposed to bring out the work at 2s., to which R., the author, objected, and filed his bill for an injunction restraining B. from doing so: Held, that the period of issuing a new edition was that at which the author was entitled to take the account, and to determine the arrangement; and that, after notice, B. was not at liberty to publish a new edition without R.’s consent: Held, that as the agreement was defective, neither party was entitled to costs up to the hearing. *Reade v. Bentley*, 30 Law Tim. Rep. 269.

FEME COVERT [*ante*, pp. 113, 176].—*Bill of exchange*.—*Separate estate*.—*Notice that it was in respect of*.—*Forgery of her indorsement*.—*Bonâ fide holder*.—*Purchaser for valuable consideration*.—*Equities*.—*Legal title*.—The following case has been noticed, *ante*, pp. 113 and 176, and as it overrules the decision there noticed, it requires the readers’ attention:—A bill of exchange was drawn by the trustee of a lady’s marriage settlement in her favour, and was transmitted to her in a letter of which her husband obtained possession. He abstracted the bill, and having forged his wife’s indorsement, and himself indorsed it, took it to the defendant P., who also indorsed it, and then procured it to be discounted. The money was paid to the husband, who absconded with it; and the lady, before the bill became due, having discovered the fraud, gave notice to the acceptors, who refused to pay the amount at maturity. The discounters then recovered the amount in an action brought by them against P., who in turn instituted proceedings against the acceptors, when the lady filed her bill in Chancery, prayed an injunction against that action, and an order against the acceptors directing them to pay the amount to her separate receipt. The Master of the Rolls held that the fact of a bill being drawn in favour of a married woman was notice that it was in respect of her separate estate, and awarded a perpetual injunction as prayed; but holding that P. had a legal title to the bill, he could not order him to deliver it up. From this decree the defendant appealed: Held (reversing his Honour’s decision), that P. being a purchaser for valuable consideration,

and a *bonâ fide* holder of the promissory note, was the person legally entitled, and that a court of equity would not interfere to defeat that title. No blame was to be imputed to him for not having made further inquiries after he had received the husband’s assurance that the indorsement of the plaintiff’s name was her own signature. Their lordships, however, thought it unnecessary to decide whether the knowledge of the fact that the payee of the promissory note was a married woman was or was not constructive notice that such note formed part of her separate estate. *Dawson v. Prince*, 30 Law Tim. Rep. 237.

MORTGAGE.—*Priority*.—*Delivery of title-deeds to mortgagor, effect of*.—In order to postpone a prior mortgagee on account of his having allowed the mortgagor to have the title-deeds, it is settled that the onus is on the party seeking to postpone him of showing, not merely that he has the deeds, but through gross negligence the prior incumbrancer has not got them. In *Allen v. Knight* (15 L. J. Ch. 430; 16 Id. 370), the deeds had got into the hands of the mortgagor, and he parted with them. There was no evidence as to how they got into his hands, and Wigram, V. C., first, and Lord Gottenham afterwards, held, that the burthen of proof was on the person seeking to postpone the other, and no gross negligence would be presumed from the mere fact of possession. In *Colyer v. Finch* (26 L. J. Ch. 65), the doctrine was fully and completely settled; and Turner, V. C., in *Hewitt v. Loosemore* (21 L. J. Ch. 69), lays it down clearly and precisely that there must be gross negligence, and that making no inquiry would be gross negligence. In the following case, it appeared that J. C., being a trustee of real estate under a will, and being also beneficially interested in the same estate under the same will, mortgaged his interest and delivered the title-deeds to the mortgagee. The mortgagee afterwards handed back the title-deeds to J. C., who executed other mortgages, delivering the deeds to the subsequent mortgagees: Held, that the first mortgagee had not lost his priority, the deeds having been properly delivered up to J. C. as a trustee. *Carter v. Carter*, 27 Law Journ. Ch. 74.

MORTMAIN.—9 Geo. 2, c. 36.—*Shares in a cost-book mine*.—Shares in a mine worked on the cost-book principle are personal property, and not within the provisions of 9 Geo. 2, c. 36, the shareholders taking no interest in the land so as in any case to entitle them to its possession. *Hayter v. Tucker*, 6 Week. Rep. 243.

NAME AND ARMS.—*Direction to take and use*.—*Discontinuance of user*.—Where there is a gift of property, coupled with a direction to take a name and arms within a fixed period after coming into pos-

session, with a divesting clause in case of refusal or discontinuance for the same period after being so entitled as aforesaid, the direction applies to the period fixed next after coming into the possession; but the discontinuance taking place at any time after the party becomes entitled, will operate as a forfeiture. *Blagrove v. Bradshaw*, 6 Week. Rep. 266.

PATENT.—*Inventor*—*Great Seal applied on terms*.—M., who had been a skilled workman of R.'s at a salary of £300 a year, opposed the granting of a patent to R. for an improved method of making metal tubes, alleging, as his ground of opposition, that he was the inventor. This was denied by R., and the evidence was conflicting, but tended to show that neither of them could lay claim to be the sole originator of the improvement, but that they both invented it together: Held, that R. would be entitled to have his patent sealed, he undertaking to make himself a trustee jointly for himself and M. of the patent. Where a matter is much in doubt, the court will run the risk of putting the party opposing to the costs of opposing ulterior proceedings, rather than withhold the Great Seal from letters patent, and that for obvious reasons—the one creating a remedial, and the other an irremedial injury. *Re Russel*, 30 Law Tim. Rep. 178.

PRINCIPAL AND AGENT.—*Accounts*—*Statute of Limitations*—*Acquiescence*—*Shareholders*.—In the case of *Haigh v. Gray* (20 Beav. 219), the Master of the Rolls said:—"It cannot be too generally known or understood amongst all persons dealing with each other in the character of principal and agent, how severely a court of equity deals with any irregularities on the part of the agent, how strictly it requires that he who is the person trusted shall act in all matters relating to such agency for the benefit of his principal, and how imperative it is upon him to preserve correct accounts of all his dealings and transactions in that respect, and that the loss, and still more the destruction of such evidence by the agent, falls most heavily on himself." In the following case, it was held that if a company does not discover, and has not the means of discovering, the correctness of entries in a succession of accounts rendered by their agent, they are not, after the decease of the agent, precluded by lapse of time, or by certain shareholders omitting against opposition to press for explanations previously asked, from showing that such entries are not only erroneous, but fraudulent. Where the accounts of an agent acting for a company have been improperly kept or mystified, and not duly rendered and explained when asked for, the court will direct them to be taken through a period of twenty-five years, though accounts sent in had been acted on, and though shareholders who asked for further informa-

tion and explanations on such accounts did not persevere to obtain them. The manner in which the court will direct the accounts to be taken. *Stainton v. The Carron Company*, 6 Week. Rep. 89.

SPECIFIC PERFORMANCE.—*Claim of a stranger*—*Costs*.—Where, upon a contract to purchase, a third party puts in a claim, which is not merely a frivolous one, but upon which there is a reasonable doubt, the court will not decree specific performance against the purchaser. Where a third person, not a party to a suit for specific performance of a contract for sale, make such a claim independently of vendor and purchaser, the bill was dismissed without costs. *Heseltine v. Simmons*, 6 Week. Rep. 268.

VOLUNTARY SETTLEMENT.—*Husband and wife*—*Creditor*—*Statute of Frauds*—*Part performance*—13 Eliz. c. 5.—It has been decided that a parol promise before marriage to settle property after marriage will not be enforced in courts of equity. The law has wisely precluded such parol contracts, and required that in order to be valid such contracts shall be in writing signed by the party to be charged. Therefore, where a husband promises his wife before marriage to settle her property, and induces her to marry before settlement, on the representation that he is solvent, and that a settlement will be as good after as before marriage, and a settlement of her property, consisting of stock in a railway company, is subsequently made, such settlement is void against creditors, under 13 Eliz. c. 5, the husband being insolvent at the time of the parol agreement. *Warden v. Jones*, 6 Week. Rep. 180.

WINDING-UP JOINT-STOCK COMPANY.—*Injunction*—*Jurisdiction*—*Equities*—*Action brought during pendency of petition*—*Restraining legal right*—*Registrar's certificate*.—Where a petition to wind up is pending, and a creditor brings an action against the company, the court will not interfere except for the general benefit of the creditors, and will not allow a creditor to incur useless expense, and gain a greater priority than his diligence entitles him to. Under the 84th section of the Winding-up Act of 1856, the court has jurisdiction in an administration suit, at its discretion, to restrain the legal right where equity requires it. Where registration has taken place after suspension of payment, the court can only regard the registrar's certificate. Where a creditor sues a company at law, pending a winding up petition, the court will, in the exercise of its discretion, stay all proceedings until further order, with liberty to the creditor to come in under the winding up, the company undertaking to submit to judgment under the direction of the court. *Re The Northumberland and Durham District Banking Company*, 6 Week. Rep. 267.

WINDING-UP ACTS.—*Building societies within the acts.*—The 1st section of the 11 & 12 Vic. c. 45, enacts that the act shall apply to all companies, associations, and partnerships, to be formed after the passing of the act, whereof the capital or the profits were to be divided into shares, and such shares transferable without the express consent of all the co-partners. By the 2nd section of the same act, it is provided, that all associations or companies formed for the purpose of working mines or minerals, and all benefit building societies other than such as were duly certified and inrolled under statutes in force respecting such societies, shall be liable to the operation of this act. By the 2nd section, therefore, building societies which were inrolled were expressly excluded from the act. But by the 1st section of the 12 & 13 Vic. c. 108, it is enacted, "that, notwithstanding anything contained in the Joint-Stock Companies Winding-up Act of 1848, importing a more limited application thereof, the same shall apply to all partnerships, associations, and companies, whereof the partners or associates are not less than seven in number, whether incorporated or unincorporated, and whether formed or subsisting before or after the passing of the said act or this act, other than and except railway companies incorporated by act of Parliament, to which companies such act shall not apply." In the following case (following the decision of the Lord Chancellor in *Re Sherwood Loan Society*, 20 L. J. Ch. 177, that loan societies were within the Winding-up Acts), it was decided by V. C. Kindersley, that upon a petition for winding up a benefit building society, which had been duly inrolled under the provisions of the act 6 & 7 Will. 4, c. 32, that such societies came within the operation of the Winding-up Acts. *Re The St. George's Benefit Building Society*, 27 Law Journ. Ch. 96.

EQUITY PRACTICE.

DISCLAIMER.—*Costs—Offer to dismiss bill.*—To entitle a disclaiming defendant to receive his costs upon dismissal, he must not only state to the plaintiff his disclaimer, but offer at the outset to have the bill dismissed against him without costs. *Talbot v. Kemshead*, 6 Week. Rep. 263.

INTERROGATORIES.—*Amendment of bill—Time for filing interrogatories.*—Some practitioners have imagined that where they have neglected to file interrogatories in due time, they can get over the difficulty by amending the bill, and then filing interrogatories; but the following decision shows that this cannot be done, at least not as a matter of course. It appeared that the plaintiff had filed his bill on the 25th of May, and amended it on the 9th of June without filing interrogatories. The defend-

ant, on the 8th of September, put in a voluntary answer. On the 19th of September the plaintiff recommended his bill, and on the 1st of October filed interrogatories: Held, that the plaintiff could not require from the defendant an answer to these interrogatories. *Denis v. Rochussen*, 6 Week. Rep. 265.

FORMA PAUPERIS.—*Infant suing by next friend—Infant suing in formâ pauperis.*—An infant of the age of twenty made an affidavit that he was not worth £5, and he applied to the court to be allowed to sue in *formâ pauperis* by his next friend, who was also a pauper; but it did not appear that the infant was unable to procure a substantial person to act as his next friend: Held, that he was not entitled to sue in *formâ pauperis*. If an infant is unable to procure any person but a pauper to act as his next friend, he would, on special application, be allowed to sue by his next friend in *formâ pauperis*. *Lindsey v. Tyrrell*, 30 Law Tim. Rep. 238.

COMMON LAW.

BILL OF EXCHANGE.—*Want of consideration—Debt of third party—Mistake as to liability—Assignment of business.*—In Byles on Bills (p. 109, 7th ed.) it is said that a debt due from a third person is a good consideration for a note payable at a future day, for the note amounts to an agreement to give time to the original debtor, and that indulgence to him is a consideration for the maker. And in the following case it was decided that a person who gives another bill, payable at a future day, for the debt of a third party due to that other, cannot, in an action against him on the bill, set up want of consideration as a defence. Therefore, in an action by the indorsee against the drawers of a bill of exchange at sixty days' date, the Court of Common Pleas refused to allow the defendants to put a plea upon the record, either on legal or equitable grounds, to the effect that the bill was drawn by the defendants for a debt due to the plaintiffs from another company, which had assigned to them its business and obligations on the supposition that such assignment was valid, but that such assignment was wholly illegal and void. *Balfour v. The Official Manager of The Sea Fire Life Assurance Company*, 27 Law Journ. C. P. 17.

BILL OF EXCHANGE.—*Promissory note—Ambiguous instrument unaccepted but indorsed by drawee—Blank acceptance—Authority to draw—Mistake in date—Statement in the declaration.*—The authority given by a blank acceptance to fill it up for the amount which the stamp will cover is not lost merely because the drawer, by mistake, antedates the instrument a whole year, even although it is made payable some time after date; and if the

period has in fact elapsed, from the time of the completion of the instrument, an action may be maintained on it, and the variance will be amendable. An instrument drawn in the form of a bill, payable to bearer, even if accepted in blank, and afterwards filled up by the drawer, may be declared upon by the indorsee, as a promissory note made by the drawer and indorsed by the drawee; at all events, the variance, if any, will be amendable. *Armfield v. Allport*, 27 Law Journ. Ex. 42.

CONTRACT.—*For the sale of goods—Breach in delivering other goods in same package with the goods ordered—Right of vendee to reject the whole.*—Where, upon a contract for the sale of goods, there is a delivery of goods in excess of those ordered, the right of the vendee to reject the whole will depend upon the particular circumstances of each case. And where the vendor was a wholesale dealer at Bristol, and the vendee a shopkeeper at Peterborough, and the additional goods were packed up in the same crate with those which were ordered, but were of a different kind: Held, by Lord Campbell, C. J., and Wightman, J., that the vendee was entitled to reject the whole;—by Coleridge and Erle, J. J., that he was not. *Levy v. Green*, 30 Law Tim. Rep. 241.

CONTRACT.—*Right of action, parties to sue—Joint or several—When covenantees must sue jointly—Joint interest—Guarantee.*—Great difficulty frequently arises where several persons are parties to a deed or simple contract as to whether they must all sue, or whether some or one of them can sue alone. As to deeds, it is said in 1 Wms. Saund. 154, note (a) to *Eccleston v. Cliphsham*:—"That wherever the interest of the covenantees is joint, although the covenant be in terms joint and several, the action follows the nature of the interest, and must be brought in the name of all the covenantees; but where the interest of the covenantees is several, they may maintain separate actions, though the language of the covenant be joint." The rule is stated more generally in 1 Chitty on Pleading, 2nd edit., p. 9, in the following terms:—"When the contract is made with several persons, whether it were under seal, or in writing but not under seal, or by parol, if their legal interest be joint, they must all, if living, join in an action in form *ex contractu* for the breach of it, though the covenant or contract with them was in terms joint and several. These observations will explain the following decision:—It appeared that F. was indebted to A., B., and C. severally in several sums of money, for which they held several mortgages on several parcels of land, and A., B., and C. had brought separate actions against F.; and in pursuance of an agreement made among them and other persons for securing those debts, an indenture was prepared, to which they

were all parties, in which F. covenanted to complete buildings on the mortgaged premises, according to certain plans, &c., and A., B., and C. covenanted to advance £1,557 to F. during the progress of the works. In further pursuance of the arrangements, the defendants gave to A., B., and C. a guarantee, which stated that, in consideration of the arrangements entered into by A., B., and C., and their covenanting to advance to F. for the purpose of enabling him to complete the buildings, they guaranteed that F. should perform the covenants entered into by him with A., B., and C. in the indenture; the joint and separate liability of the defendants not to exceed £100: Held, that A. alone could not sue the defendants on the guarantee; the interest of A., B., and C. in the guarantee being joint and not several. *Pugh v. Stringfield*, 27 Law Journ. C. P. 34.

CROWN.—*Prerogative—Colonial bishopric—Promotion to—Right to present to the benefice vacated.*—It is fully established that on the promotion of the incumbent of a benefice in England to a bishopric in England, the benefice is so avoided, and it belongs to the Queen to present to the benefice so avoided. This is clearly a prerogative of the Crown, whatever may have been the reason for it, and however it may have been acquired. It rests upon uniform usage, and is supported by so many dicta of our text writers and decisions of our courts of justice, that it cannot now for a moment be questioned. The prerogative is stated likewise to extend to the bishopric of Sodor and Man, not within the realm of England, although held under the Crown of England, that see having been immemorially a see of the Church of England, anciently attached to the province of Canterbury, and more recently to the province of York. Whether the prerogative likewise extends to the case of an English incumbent promoted to a bishopric in Ireland, has been considered a question of great doubt. In Mallory's *Quare Impedit*, 113, the learned author says that, "*de jure communi*, all promotions are vacated by the taking of a bishopric as such, and that not only English promotions to bishoprics in England, but likewise English promotions to bishoprics in Ireland, and *vice versa*;" the consequence, no doubt, being understood to be that the Crown would be entitled to present to the vacant benefice. So in 1 Gibson's *Codex*, lib. 33, c. 2, it is said, "Upon promotion of any person to a bishopric in England or Ireland, the King hath a right to present to such benefices or dignities as the person was possessed of before such promotion." On the other hand, Lord Coke, 4th Institute, 356, 357, commenting on the case in which the Bishop of Exeter was fined for his contempt, in not admitting the King's presentee to an archdeaconry within his diocese, which the arch-

deacon had vacated on being promoted to be Archbishop of Dublin, says: "That when the archdeacon was by the King preferred to an archbishopric, he (the King) has the presentation to the archdeaconry, in respect of the temporalities of the Bishop of Exeter, patron of the archdeacon, and not by any prerogative." In the following case, it was held that the prerogative right of the Crown to present to a benefice in England, vacated by promotion of the incumbent to a bishopric in England, does not extend to a colonial bishopric created by the Crown, and without any jurisdiction except over those who voluntarily submit to jurisdiction. Where the prerogative exists, it is not defeated by the circumstance of the advowson having been granted away by the Crown. *Reg. v. The Provost, &c., of Eton College*, 30 Law Tim. Rep. 186.

DISEASED ANIMAL.—*Action, when maintainable—Exposure of glandered horse.*—By the 16 & 17 Vic. c. 62, continued by 19 & 20 Vic. c. 101, it is illegal knowingly to bring, or attempt to bring, a glandered horse for sale into any market, fair, or other open or public place where animals are commonly exposed for sale; but there is nothing in the statute to prohibit the simple sale of such horse. In the following case, the declaration alleged that the defendant was possessed of a horse, and knowing it to be afflicted with the glanders, caused it to be sold by auction at a horse repository, and the plaintiff, believing it to be in a healthy state, became the purchaser, and paid a large sum for it; and by reason of its diseased state, the horse was utterly worthless to the plaintiff, and he paid a veterinary surgeon for examining it; and in consequence of the horse being put into the plaintiff's stable, wherein another horse of his was, the last mentioned horse became infected and died of the disease, and the plaintiff was obliged to pay a large sum in endeavouring to cure it: Held, on demurrer (Pollock, C. B., *dubitante*), that the declaration disclosed no cause of action. *Hill v. Balls*, 27 Law Journ. Ex. 45.

DISTRESS.—*Conversion—Money had and received, evidence of—Restoration of goods unsold, and surplus proceeds of goods sold.*—The case of a landlord after a distress is quite different from the class of cases where, in the ordinary course of commercial dealing, parties are made aware that they have possession of the goods of others; for a landlord distraining exercises a legal right, and may decline, in the exercise of it, to embarrass himself with the rights of third parties. He may restore the goods remaining unsold to the premises from which he removed them, and may leave any stranger who claims them to enforce his right against the tenant. The liability of goods to distress does not depend on the ownership of them, but upon their being found

on the premises demised. To whomsoever they belong, they may be seized for rent. In the following case, it was held that a landlord or bailiff who has distrained, even if not bound (as, *semble*, he is) to restore goods remaining unsold to the premises on which he distrained them, is at liberty to do so; and his doing so will not be a conversion, even although they are the goods of third parties, and the bailiff has had notice of this from them, after the impounding, and has promised to act on the notice, both as to goods unsold, and the surplus proceeds of goods sold: for such a promise does not impose any duty on the bailiff to deliver the goods to the right owner, neither will it sustain an action for money had and received to recover the surplus proceeds of the goods sold. *Evans v. Wright*, 27 Law Journ. Ex. 50.

MALICIOUS PROSECUTION.—*Reasonable and probable cause—Evidence of malice—Continuing unauthorised proceedings.*—There is a material distinction, as to liability for malicious prosecution, between the institution of the prosecution and its continuance, after it has been already instituted, without authority, by an agent. And the absence of reasonable and probable cause, which might be evidence of malice in the one case, will not be so in the other. Where the party put in possession under a bill of sale had issued a summons against the assignor for feloniously stealing some of the chattels assigned, and the assignees attended the hearing, and allowing the case to be opened on the behalf of prosecutors: Held, that the absence of reasonable and probable cause would not be evidence of malice as against them; and, *quære*, whether there was such an entire absence of reasonable and probable cause as would, in any case, be evidence of malice. *Weston v. Beeman*, 27 Law Journ. Ex. 67.

SHIPPING.—*Insurance on ship—Abandonment—Right of abandonees to compensation in the nature of freight for carriage of the shipowner's goods prior to the casualty.*—The underwriters of a policy on a ship are not entitled, upon the abandonment of the ship to them, to any compensation in the nature of freight for the carriage of the shipowner's own goods prior to the happening of the casualty to which the abandonment refers; even though the shipowner may have insured with other underwriters under the designation of freight, the increased value of his goods by reason of their being carried on the voyage during which the accident happens. But for the carriage of the shipowner's goods after the casualty, the underwriters are entitled to such compensation, to be calculated according to the current rate of freight. *Miller v. Woodfall*, 30 Law Tim. Rep. 240.

SHIPPING.—*Insurance—Passengers—Policy against loss by liabilities under Passengers Act Amend-*

ment, 15 & 16 Vic. c. 44—Expense of forwarding passengers by other ships.—The plaintiffs, shipowners, effected with the defendants a policy "against all costs, charges, and liabilities to which the owners or charterers of the ship M. P. might be subject under the clauses 46, 47, 48, 49, and 150 of 15 & 16 Vic. c. 44" (Passengers Act Amendment). The ship struck on a bank about sixty miles from her port of discharge on the voyage insured; and the captain incurred a large expense in hiring steamers, into which, after vain endeavours to haul the vessel off the bank, he transferred her passengers who were taken on board such steamers to their destination: Held, that assuming the expense was within the policy, in estimating it such part of the expenditure as had reference to the attempts to get the vessel off, so that she might prosecute her voyage, ought not to be taken into account, but only so much of the hire of the steamers as was paid for the carrying the passengers to the place where the voyage ought to have terminated. *Quære*, whether the plaintiffs were entitled to recover anything. *Bains v. The Royal Exchange Assurance Company*, 6 Week. Rep. 247.

STATUTE OF LIMITATIONS.—*Signing acknowledgment.*—The defendant pleaded a plea of the Statute of Limitations to an action on two promissory notes. It was proved that he had at the request of the plaintiff made a statement in writing of his affairs, beginning with the words "J. Mackrill," in his own handwriting, and in which he debited himself with the notes given to the plaintiff: Held, that the statement was signed within the meaning of the statute, and involved a promise. *Holmes v. Mackrill*, 30 Law Tim. Rep. 243.

THE METROPOLITAN BUILDING ACT.—*Exemption of building belonging to and used for the purposes of a railway company—Surveyors' fees.*—By s. 6 of 18 & 19 Vic. c. 122, buildings belonging to and used for the purposes of a railway company under the provisions of an act of Parliament are exempted from the operation of the first part of that act: Held, that the exemption extends to a stable made by walls built at each end of, and closing an arch under, a viaduct on the North Kent Railway. *The Secretary of the North Kent Railway Company v. Badger*, 6 Week. Rep. 246.

TROVER.—*Measure of damages where an offer to return the chattels has been made after writ issued.*—In trover the conversion proved was a refusal to deliver upon demand; but it was also proved that after a writ was issued the defendant offered to return the chattels; which offer was then declined: Held, that the measure of the damages was the value of the chattels at the time of the conversion, and not the difference in their value between the

time of the conversion and the offer to return. *Homer v. Mallars*, 30 Law Tim. Rep. 241.

TROVER.—*Conversion—Evidence of, by implied admission by defendant not called as a witness to explain it.*—Although, where there is no evidence in itself to affect a defendant, the mere fact that he is not called as a witness is not sufficient to sustain a verdict against him; yet if there is some evidence against him (as an implied admission on his part), then the circumstance that he is not called to explain it may be enough to turn the scale and sustain the verdict. In an action for the conversion of a bill of exchange, it being proved that the defendant had said, in answer to a demand for it, that he could not give it up because it had been burnt, and the defendant not being called as witness: Held, that the case was rightly left to the jury, and that their verdict for the plaintiff was justified by the evidence. *M'Keown v. Cotching*, 27 Law Journ. C. P. 41.

TROVER.—*Conversion—Title—Plaintiff's fraud—Receipt given to deceive third parties—Simulated sale.*—Where goods are proved to have been transferred by deed, they are proved to have been actually transferred, for at the moment of the deed being executed, the goods cease by law to be the property of the person executing the assignment, and from that moment become the property of the person in whose favour the deed is executed. But that is not the case where what is done is the giving of an invoice, and of a receipt, and no money passes, and the transaction is a mere sham. There is an essential difference between a release and a receipt: the former must be set aside, or it will otherwise operate as a bar to an action; but a receipt is only evidence of payment, and the jury are not bound to find that payment was made simply because a receipt was given, where the other evidence shows that there was no payment. The case of *Alner v. George* (1 Camp. 392) was overruled by *Graves v. Key* (3 B. and Adol. 318), in which last case Lord Tenterden said "a receipt is an admission only, and the general rule is that an admission, though evidence against the person who made it, and those claiming under him, is not conclusive evidence, except as to the person who may have been induced by it to alter his condition." These observations will explain the following case. The plaintiff, apprehending that an execution might be put in upon his goods, colluded with the defendant that in the event of their seizure, the defendant might appear to be the owner of them, and with that view made out an invoice of the goods to the defendant, gave a receipt for the purchase-money, and a person was put in possession, as if for the defendant, no money passing, and the entire transaction being a sham: Held, that the plaintiff might maintain an action against the defendant for

the conversion of these goods, and that he was not precluded from showing that the receipt was given merely to defraud execution creditors; and that the property in the goods was never transferred. *Alner v. George* (1 Camp. 392) overruled. *Bowes v. Foster*, 6 Week. Rep. 257.

WAY, RIGHT OF.—*Construction of agreement—Reasonable use of the way—Question for the jury—Trespas.*—Where premises are demised or conveyed "with right of way thereto," it may be a question for the jury what is a reasonable use of such right. Where a right of way was expressed to be "through the gateway" of the plaintiff (which gateway led to other premises of the plaintiff), and, at the time of the lease, carts could come in to load and unload, and turn round and go out again, but, through alterations of the premises, could not now do so without slightly trenching upon the plaintiff's premises: Held, that in the reasonable use of the right of way, the defendants had a right to do this; and that what was a reasonable user was for the jury. *Hawkins v. Carabines*, 27 Law Journ. Ex. 44.

COMMON LAW PRACTICE.

ARBITRATION.—*Award disposing of each issue raised by the pleadings.*—Where an action, in which there are several issues, is referred, the arbitrator should not certify for a general verdict only, but should dispose of each issue. *Holland v. Judd*, 30 Law Tim. Rep. 275.

ARBITRATION.—*Compulsory reference—Account.*—The court will not refer an action upon a mere account compulsorily, unless it be shown that it cannot be conveniently tried by a jury. *Pellatt v. Markwell*, 30 Law Tim. Rep. 275.

ARBITRATION.—*Some issues found for plaintiff and others for defendant—Costs.*—Where, by the terms of the submission, the costs of the reference and of the cause are to abide the event of the award, and the declaration contains counts upon distinct causes of action, some of the issues upon which the arbitrator finds for the plaintiff, and some for the defendant, so that the plaintiff recovers damages for the one cause of action and not upon the rest, the event of the award being in favour of the plaintiff, he is entitled to the costs of the cause. *Reynolds v. Harris*, 30 Law Tim. Rep. 275.

ARREST.—*Civil process—Privilege* [vol. 3, p. 158]—*Witness—Police court—Voluntary attendances.*—In *Ex parte Cobbett* (26 Law Journ. Q. B. 293), it was held that a person who attended before a justice of the peace to obtain a summons on a complaint against a clerk of turnpike trustees for penalties was not privileged from arrest on civil process in returning to his residence. In the following case it was held that a person attending

before a police magistrate as a witness on a charge of felony after a remand, is privileged from arrest on civil process, *eundo, morando, et redeundo*, though he was not under recognisances or summons to appear. *Montague v. Harrison*, 27 Law Journ. C. P. 24.

ATTORNEY.—*Striking off roll—Answering matter of affidavits.*—In motions impeaching the conduct of attorneys of this court, the rule is, that where the matter alleged against an attorney is not of itself sufficiently grave, when proved, to justify the striking of his name off the rolls, the motion should simply call upon him to answer the matter of affidavits; but where the matter is sufficiently strong to require his removal from the rolls the motion should take the severer form, and be made to strike him off the rolls. *Re An attorney, &c.*, 30 Law Tim. Rep. 243.

BILL OF EXCHANGE ACT.—*Summary remedy—Right of defendant to appear and defend under 18 & 19 Vic. c. 67.*—The defendant has a right to set up any defence to a bill of exchange which is not merely fictitious, and cannot be deprived of this right under 18 & 19 Vic. c. 67. *Matthews v. Marsland*, 6 Week. Rep. 244.

BILLS OF EXCHANGE ACT.—18 & 19 Vic. c. 67—*Costs—City of London Small Debts Act.*—By the 18 & 19 Vic. c. 67, the plaintiff may recover a sum for costs, to be fixed by the masters of the superior courts, subject to the approval of the judges. It has been decided that the City of London Small Debts Act, 15 & 16 Vic. c. lxxvii., does not deprive a plaintiff of his costs under the above act of the 18 & 19 Vic. c. 67, where the bill sued upon is under £20, and the plaintiff and defendant both reside within the limits of the City of London Act. *Healey v. Johns*, 6 Week. Rep. 261.

COSTS.—*Security for—Increase of security.*—Where, upon an interpleader, a party has been let in to defend on the condition of his paying money into court, and giving security for costs to an amount to be fixed by the master, on whose decision security has been given to a certain amount. *Quære*, if the court can order that security to be increased. At all events, the court will not do so merely because it turns out that, by reason of commissions or from other causes which were not unforeseen when the master settled the amount of security, the costs are likely to exceed the amount for which the security was given. *Foster v. Colby*, 27 Law Journ. Ex. 55.

ELEGIT.—*Sheriff's poundage on second elegit against the same lands*—29 Eliz. c. 4—3 Geo. 1, c. 15, s. 16.—The following is an important decision as to the effect of more than one elegit being left with the sheriff, and his right to poundage in respect thereof. The defendant recovered judg-

ments in three actions against A., and issued three writs of *elegit* indorsed to levy £1,143 10s., £6,008 10s. and £1,411 respectively. The sheriff held an inquisition, by which it was found that A. was possessed of a term of years in certain property of the annual value of £3,000. The sheriff received poundage at the rate of one shilling in the pound on £3,000, the alleged annual value, but he claimed poundage also on the two other writs: Held, that the sheriff had spent his power under the first writ, and had seized all that could be taken under it, and that therefore the lands could not be extended under the second and third writs, and that no poundage was payable under them. *Carter v. Hughes*, 30 Law Tim. Rep. 275.

INTERROGATORIES.—*Too extensive, rejected—Amendment by the court or judge.*—If interrogatories are drawn far too wide, it is not for the court or a judge to cut them down to the proper limits, but they will be rejected in *totò*. *Robson v. Crawley*, 6 Week Rep. 260.

INTERROGATORIES.—*Neglect to answer—Attachment—Oral examination of the parties.*—Section 51 of the Common Law Procedure Act, 1854, provides that if the party omits, without just cause, sufficiently to answer, he shall be deemed to have committed a contempt of court. Section 53 enacts that in case of omission, without just cause, to answer sufficiently the interrogatories, the court may direct an oral examination. The Court of Exchequer has decided, that where a party to whom interrogatories have been allowed to be administered, under the Common Law Procedure Act of 1854, s. 51, has neglected to answer at all, without just cause, it may be admissible to apply for an order, under section 53, for his oral examination, instead of proceeding by way of attachment for contempt; at all events, where there is a question whether, by reason of illness, or on account of co-parties to the suit having sufficiently answered, or otherwise, the neglect is not altogether without "just cause," and certainly is not wilful or contumacious in the sense of a defiance of the authority of the court. But the rule for an oral examination is only *nisi* in the first instance. *Turk v. Syne*, 27 Law Journ. Ex. 54.

JUDGMENT.—*Revising judgment more than ten years old—Motion to enter suggestion under C. L. P. Act, 1852—Application by executors of administrator of deceased plaintiff.*—The executors of an administrator of a deceased plaintiff are not entitled to revive a judgment more than fifteen years old by entering a suggestion under the C. L. P. Act, 1852. *Croft v. Foulkes*, 30 Law Tim. Rep. 241.

PUBLIC COMPANY.—*Joint Stock Banks Regulation Act—7 & 8 Vic. c. 113, s. 21—Scire facias against legal representatives of deceased shareholder.*—

By sec. 21 of the 7 & 8 Vic. c. 113, "the persons whose names shall appear from time to time in the then last delivered memorial, and their legal representatives shall be liable to all legal proceedings under this act as existing shareholders of the company, and shall be entitled to be reimbursed as such existing shareholders only out of the funds or property of the company for all losses sustained in consequence thereof." It has been decided that the words in the above section, the "legal representatives" of a person whose name appears in the last delivered memorial, are only liable in respect of that person's estate and effects where that person would have been liable in his lifetime in consequence of his name so appearing. Therefore, where the name of a deceased shareholder in a joint stock bank was inserted after his death, in the last delivered memorial, and an action was subsequently brought against the bank, and judgment recovered against the official manager, and no satisfaction could be had out of the property of the bank: Held, that the executors of the person whose name was so inserted were not liable in respect of his estate and effects in a *scire facias* on the judgment. *Powis v. Butler*, 6 Week Rep. 252.

VENUE.—*Change of, on common affidavit unanswered.*—The usual affidavit on the part of the defendant on an application to change the venue to the assizes—i. e. that the cause of action arose in the country, and that the parties reside there, and their witnesses—is sufficient, if unanswered. But, per Martin, B., it is answered by the inconvenience arising from the delay of the action until the assizes, unless that is counterbalanced by some advantage on the other side; as, for example (when the question is only as to amount) the defendants undertaking to pay money into court. *Gough v. Bertram*, 27 Law Journ. Ex. 58.

WRIT OF SUMMONS.—*Altering date of writ of summons.*—The date of a writ of summons cannot now be altered after it is issued. *Clarke v. Smith*, 6 Week Rep. 260.

PROBATE AND DIVORCE.

ADMINISTRATION.—*Practice—Presumption of death—Advertisements in newspapers.*—W. T. N., a settler in New Zealand, embarked July 1st, 1856, in a vessel bound for Sydney, on his way to England. The vessel never reached Sydney; and as no intelligence after inquiries had been instituted was obtained as to the vessel or any of those on board, she was supposed to have foundered at sea in some heavy gales which occurred at the time she was making the voyage in question: Held, that the death of W. T. N. was to be presumed. *Semble*, that advertisements in newspapers for a person supposed to be dead may be dispensed with, where his history

is traced up to a period shortly prior to his death. *Re Norris*, 6 Week. Rep. 261.

ADMINISTRATION.—*Practice—Presumption of death—Payment of policy by underwriters.*—A. M. sailed from Liverpool in the Brevel, January 27th, 1857, for Valparaiso. The voyage should have been made in ten weeks. Nothing had been heard of either the Brevel or crew since she left Liverpool. The Brevel was insured, and underwriters had paid policy thereon, as upon a total loss: Held, that the death of M. was to be presumed; that payment of policy by underwriters was strong evidence in favour of such presumption. *Re Main*, 6 Week. Rep. 262.

COUNSEL.—*Privilege of—Non-contentious business.*—Barristers-at-law are not admissible to practice in the Court of Probate in non-contentious business. Motion for grant of letters of administration is non-contentious business. *Re Ludlow*, 30 Law Tim. Rep. 278.

DISSOLUTION OF MARRIAGE.—*Adulterer made a co-respondent.*—The 28th section of the 20 & 21 Vic. c. 85, directs, that upon any petition for dissolution of marriage, presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the petition, unless, on special grounds to be allowed by the court, he shall be excused from so doing. It has been held that a suggestion that the husband had, before the commencement of the act, obtained a verdict and recovered damages in crim. con. action, is no special ground to excuse him from making the alleged adulterer a co-respondent to a petition for dissolution of marriage. *Anonymous*, 30 Law Tim. Rep. 278.

PROBATE.—*Property out of province—20 & 21 Vic. c. 77, s. 87—Additional probate duty.*—By sec. 87 of the 20 & 21 Vic. c. 77, it is provided that legal grants of probate and administration made before commencement of this act, and grants of probate and administration made legal by this act, shall have the same force and effect as if they had been granted under this act; but in every such case there shall be due and payable to her Majesty such further stamp duty, if any, as would have been chargeable on any probate or administration which, but for this act, would or ought to have been obtained in respect of the personal estate not covered by the grant. In the following case, it appeared that a grant of probate was taken out in the Prerogative Court of Canterbury to cover property, part of which was within, and part without, the province of Canterbury: Held, that such grant of probate took effect under 20 & 21 Vic. c. 77, s. 87, as to the property without the province; that the same amount of probate duty must be paid, as would have been before this

act came into operation. *Re Frecklington*, 6 Week. Rep. 262.

WILL.—*Subscription of attesting witness.*—W. F. having signed his will in the presence of two witnesses, A. and B.; B. being unable to write, A., by his request, guided his hand when he subscribed the will: Held, that the subscription of B. was valid. *Re Frith*, 6 Week. Rep. 262.

BANKRUPTCY.

ARRANGEMENTS.—*Dismissal of petition—Act of bankruptcy—Relation back.*—By sec. 76 of the 12 & 13 Vic. c. 106 (the Bankrupt Law Consolidation Act), it is enacted, that the filing of a petition by any such trader for an arrangement between such trader and his creditors under the provisions of this act with respect to arrangements between debtor and creditor under the superintendence and control of the court shall be accounted and adjudged conclusive evidence of an act of bankruptcy committed by such a trader at the time of filing such petition, provided a petition for adjudication of bankruptcy shall be filed against him within two months after such petition for arrangement shall have been dismissed; provided also, that no adjudication shall be made on any such act of bankruptcy unless and until after such petition for arrangement shall have been dismissed. The 223rd section provides that if such petitioning trader shall not duly attend the sitting of the court, &c., such petition shall be dismissed; and if at the first private sitting of the court, or at any adjournment thereof, the proposal of the petitioner, or some modification thereof, be not assented to, it shall be lawful for the court to adjudge such petitioner a bankrupt, and to adjourn all further proceedings in the matter into the public court, and to advertise such adjournment, and to appoint sittings for choice of assignees, and for last examination, as in bankruptcy. In the following case, it appeared that a debtor on the 25th June, 1855, presented his petition (under the Bankrupt Law Consolidation Act, 12 & 13 Vic. c. 106, s. 211) for arrangements with his creditors, but he did not attend at the adjourned meeting on the 6th August following, so that neither his proposition nor any modification thereof was accepted by his creditors. The meeting was adjourned to the public court, and the debtor adjudicated bankrupt. The petition he had presented was not in fact dismissed. Between the time of presenting his petition and the alleged adjudication in bankruptcy, on the 5th July, 1855, he assigned a debt due to him to a creditor, and notice thereof was at once given to the debtor. As above stated, it is enacted, by sec. 76, that the filing of a petition by a trader under the arrangement clauses shall be

adjudged conclusive evidence of an act of bankruptcy, provided a petition for adjudication shall be filed against him within two months after such petition for arrangement has been dismissed, provided also, no adjudication shall be made until after such petition has been dismissed, and that sec. 223 provides that where a trader does not appear or file his accounts, the petition shall be dismissed; and amongst other events, if the proposition or a modification thereof is not assented to at a public meeting, the Court of Bankruptcy shall adjourn to the public court, where they shall adjudge the trader to be a bankrupt: Held, that as the debtor's petition for arrangement was not in fact dismissed, no petition by a creditor was or could be filed under the 76th section, and that no act of bankruptcy was committed: Held, also, that the 223rd section (which provides where the Bankruptcy Court without any petition for bankruptcy adjudges the trader a bankrupt), does not cause any relation back to any prior act of bankruptcy, and consequently the creditor to whom the debt had been assigned was entitled to recover it. *Monk v. Sharp*, 30 Law Tim. Rep. 187.

COMMITAL.—*For not answering satisfactorily—Discharge of bankrupt—Insanity—Jurisdiction.*—The commissioner, having committed a bankrupt for not answering, has no jurisdiction to discharge him on the plea of approaching insanity. *Re Samuel*, 30 Law Tim. Rep. 246.

CONVEYANCE.—*Official assignee, when required to join in conveyance.*—When accounts have been stated and settled between the creditors' assignees of the bankrupts as debtors to a trust estate and the trustees, and the latter have been allowed to place upon the proceedings a proof for the balance due to the trust estate, the remainder of the trustees' claim being regarded by them as secured upon freehold property, and so credited to the bankrupts' estate by anticipation, and the freehold is afterwards sold by consent under the order of the court, the official assignee will be precluded from re-opening the accounts, and will be ordered to join in the conveyance to the purchaser. *Exp. Carnsew*, 30 Law Tim. Rep. 189.

DISCHARGE AD INTERIM.—*Non-appearance of insolvent at first examination—Recommitment of insolvent.*—Where an insolvent has obtained an order for his discharge *ad interim*, and fails to appear on the days named for his public examinations, or to send any sufficient excuse for his non-appearance, the court will not renew his protecting order, and it will issue a warrant for his apprehension, and recommit him to his former custody. *Re McCraw*, 30 Law Tim. Rep. 245.

DISPUTED ADJUDICATION.—*Practice —*

Order of proceeding.—Where the bankrupt had given notice of his intention to dispute the act of bankruptcy, the petitioning creditor's debt, and the right of any creditor, under sec. 96 of the Bankruptcy Act, 1849, to take advantage of a petition already filed by another creditor, but not proceeded with against the bankrupt, who had in the interim petitioned the court under the arrangement clauses of the act, and obtained his protection, he was required to proceed upon his last objection before inquiring into the nature and sufficiency of the petitioning creditor's debt. *Exp. Dales*, 30 Law Tim. Rep. 189.

EXAMINATION.—*Petition for protection—Private examination for the discovery of property.*—The 7 & 8 Vic. c. 96, s. 5, provides, "that upon such petition being filed, the commissioner shall possess the like power and authority, touching the seizure of the property of such petitioner (except as herein otherwise directed), and also to compel the attendance of, and to examine such, petitioner and his wife, and every person known or suspected to have any of the property of such petitioner in his possession, or who is supposed to be indebted to such petitioner, and every person whom the commissioner believes capable of giving any information concerning the person, trade, business, or calling, dealings, or property of such petitioner, or any information material to the full disclosure of the dealings of such petitioner, and to enforce both obedience to such examination, and the production of books, deeds, papers, writings, and other documents as by any law now in force relating to bankrupts are possessed by the several courts authorised to act in the prosecution of fiats in bankruptcy touching the seizure of property and the examination of any bankrupt or other person under a fiat in bankruptcy." Where there is reason to believe that an insolvent has property secreted, the court will issue a warrant authorising the seizure of such property when identified, and will issue a summons for the attendance and examination of any persons supposed to be implicated in the concealment of such property. *Re Dimsdale*, 30 Law Tim. Rep. 245.

EXECUTION.—*Defendant become bankrupt—Shareholder in joint-stock bank—Arrest after certificate—Discharge—Jurisdiction of court—Abuse of process.*—A court of common law has an inherent right to prevent its own process from being abused, and, therefore, to discharge a person taken in execution on a judgment obtained in it, but who has since become bankrupt, and got a certificate. Where, on a judgment of this court against the official manager of a joint-stock bank, an order for execution had been obtained against H., a shareholder, and H. had become bankrupt, and the plaintiff offering to prove

his debt against H.'s separate estate, was not allowed by the commissioner to do so, but only to prove his claim; and H. got his certificate, but was afterwards arrested at the suit of the plaintiff: Held, whether the commissioner decided rightly or not, that H. was entitled to be discharged, and that this court had power to discharge him, even without the aid of the 12 & 13 Vic. c. 106, s. 205, and was the proper court to apply to for his discharge. *Thompson v. Harding*, 27 Law Journ. C. P. 88.

PROOF.—Bond—Infant obligor—Laches.—An infant cannot bind himself in a bond with a penalty conditioned for payment of interest as well as principal, and, consequently, no proof can be admitted upon such an instrument. *Quære*, whether, where a proof has been admitted, the assignees can afterwards come to have it expunged for reasons known to them at the time the proof admitted. *Exp. The Unity Joint Stock Mutual Banking Association*, 30 Law Tim. Rep. 246.

PROOF.—Before prosecution—Embezzlement by bankrupt—Onus probandi—Where it lies.—The assignees, in opposing a proof upon the ground of a felonious embezzlement, and no prosecution, must show that the bankrupt has committed an indictable offence, and that the bankrupt can be prosecuted successfully. A letter written by the bankrupt to his employers, who were seeking to prove, in which he stated the necessity he felt of "laying bare all his delinquencies," is not *per se* sufficient evidence of a felony, where the bankrupt has absconded, to prevent the proof before prosecution. *Exp. Dollfus*, 30 Law Tim. Rep. 246.

PUBLIC COMPANY.—Joint Stock Companies Act, 1856—Winding-up—Evidence of loss of capital—What required.—Where, in a petition for winding-up the affairs of a company in the Court of Bankruptcy, there is a general allegation that three-fourths of the capital have been lost or become unavailable, and this is supported by the usual affidavit that the allegations contained in the petition are true, and the facts are not disputed, it is a sufficient compliance with the requisitions of sec. 67, art. 5, of the Joint Stock Companies Act, 1856; but where the above facts are disputed the court will require some better evidence of the alleged loss. *Exp. Brookes*, 30 Law Tim. Rep. 189.

TRADER-DEBTOR SUMMONS.—Petition for arrangement—Substitution of creditor—Adjudication.—By s. 96 of the Bankruptcy Consolidation Act, 1849, it is provided, "that if the petitioning creditor in any petition for adjudication of bankruptcy shall not proceed and obtain adjudication within three days after his petition shall have been filed, or within such extended time as shall be allowed by the court, the court may at any time within fourteen days then

next following, upon the application of any other creditor to the amount required to constitute a petitioning creditor, proceed to adjudicate on such petition upon the proof of the debt of such creditor, and of the other requisites to support such petition (except the debt of the petitioning creditor); but if neither the petitioner nor any other creditor shall, within such fourteen days, or within such extended time as may be granted by the court for that purpose, apply to the court to adjudicate upon such petition, no further proceedings shall be taken thereon." The Lords Justices have decided that where a creditor has commenced proceedings against his debtor with a view to making him a bankrupt, as by taking out a trader-debtor summons, and where the debtor, simultaneously with an admission of the debt, has petitioned for a private arrangement, and obtained protection under section 211 of the Bankruptcy Law Consolidation Act, 1849, the creditor is not precluded from proceeding to a bankruptcy. A petition for adjudication having been presented by the creditor, but not prosecuted within the time specified by the act, another creditor was substituted for him who presented the petition, and the adjudication was confirmed by the commissioner, and by the Lords Justices on appeal. *Exp. Dales*, 30 Law Tim. Rep. 268.

CRIMINAL LAW.

APPEALS FROM JUSTICES [*ante*, p. 142].—20 & 21 Vic. c. 43—*Case stated by justices—Application to amend.*—When justices have stated a case under the provisions of sec. 2 of the 20 & 21 Vic. c. 43 (*ante*, p. 142), the Court of Queen's Bench will not send the case back to them to be amended until it comes on in the regular way for argument and is then found to be insufficiently stated. *Christie v. The Guardians of the Poor of St. Luke's, Chelsea*, 30 Law Tim. Rep. 273.

COSTS.—Of appeal dismissed by sessions for want of jurisdiction—12 & 13 Vic. c. 45, s. 5.—The Court of Quarter Sessions has power by section 5 of the 12 & 13 Vic. c. 45, to order the payment of costs in an appeal which after being brought before them they have rightly dismissed on the ground of their having no jurisdiction to entertain it. *Reg. v. Padwick*, 6 Week. Rep. 224.

COUNTY COURT PROCESS.—Delivery of paper "purporting" to be county court process—Notice to produce.—A document appearing on the face of it to be a mere notice by a plaintiff to a defendant to produce accounts on the trial of a cause, though headed "in the county court of L.," and entitled as if in a cause in that court, does not "purport" to be any process of the county court, and will not support

an indictment so alleging it. *Reg. v. Castle*, 30 Law Tim. Rep. 188.

FALSE PRETENCES.—*Obtaining too much change for a bank note, by misrepresenting the amount of the note.*—Fraudulently misrepresenting the amount of a bank note, and thereby obtaining a larger sum than its value in change, is obtaining money by false pretences, although the person deceived has the means of detection at hand, and the note is a genuine bank note. *Reg. v. Jessop*, 6 Week. Rep. 245.

FOREIGNERS.—*Offences committed on the high seas by foreigners on board English ships—Jurisdiction of English courts*—Stat. 18 & 19 Vic. c. 91, s. 21.—The 18 & 19 Vic. c. 91, s. 21, provides that offences committed by foreigners in British vessels on the high seas may be tried by any court within the jurisdiction of which the offender is found, if the offence is one which would have been cognisable by such court supposing it to have been committed within the limits of its ordinary jurisdiction. In the following case, it was decided that a foreigner on board a British ship on the high seas owes allegiance to the law of England; and if he commits an offence against that law, he is triable under the stat. 18 & 19 Vic. c. 91, s. 21, by any court of justice in her Majesty's dominions, within the jurisdiction of which he may happen to be, provided that such court would have had cognisance of the crime if committed within the limits of its ordinary jurisdiction. And it makes no difference, in this respect, whether the offender comes voluntarily on board the British ship, or is brought and detained there against his will; nor whether he comes voluntarily within the jurisdiction of the particular court by which he is tried, or is brought within that jurisdiction against his will. *Reg. v. Sattler*, 30 Law Tim. Rep. 277.

HABEAS CORPUS.—*Prisoner under common law process—Attendance in chambers.*—Where a prisoner is in confinement under a common law process, and it is required that he should attend in chambers under an order made by the chief clerk, the court will order a writ of *habeas corpus* to issue that he may attend in custody of the officer *de die in diem*. *Buckeridge v. Whalley*, 6 Week. Rep. 180.

LARCENY AS SERVANT.—*Surplusage—Conviction for simple larceny—Stealing from agent the property of the principal.*—If upon indictment for stealing, as a servant of the prosecutor, money alleged to be his property, it appears from the evidence that the prisoner stole money from him, but that he was not his servant, the allegation in the indictment that he was his servant may be rejected as surplusage, and the prisoner may be convicted of simple larceny. *Reg. v. Jennings*, 6 Week. Rep. 231.

LUNATIC PAUPERS.—*Maintenance of lunatic paupers in borough asylum—Liability of borough or county where settlement cannot be ascertained.*—By the 18 & 19 Vic. c. 105, s. 14, the provisions of sec. 3 of 12 & 13 Vic. c. 82 were repealed, and another enactment substituted; whereby, after reciting that doubts were entertained as to the chargeability of pauper lunatics found in boroughs, whose settlements could not be ascertained, and it was considered expedient to remove such doubts, it is enacted that sec. 3 of the act 12 & 13 Vic. c. 82 shall be repealed; and where any pauper lunatic is not settled in the parish by which or at the instance of some officer or officiating clergyman of which he is sent to an asylum, registered hospital, or licensed house, and it cannot be ascertained in what parish such pauper lunatic is settled, and such lunatic was found in a borough having a separate court of quarter sessions of the peace, and which is not liable under the act 5 & 6 Will. 4, c. 76, s. 117, to the payment of a proportion of the sums expended out of the county rate, such lunatic may be adjudged to be chargeable to such borough by any two justices of such borough; and it shall not be lawful for any justices to make any order upon the treasure of any county for the payment of any expenses whatsoever incurred or to be incurred in respect of the said lunatic. And all the provisions in the Lunatic Asylums Act, 1853, as to the mode of determining that a pauper lunatic is chargeable to a county, and as to the order to be made for the maintenance of such pauper lunatic, shall extend and be applied to such borough as fully and effectually to all intents and purposes as if the said provisions were repealed and re-enacted in this act, and made applicable to such borough in the same manner in all respects as though for the purposes of this provision such borough were a separate and distinct county. It has been decided that under the above provision, a borough which has a separate court of quarter sessions, and has established a lunatic asylum of its own, and is on that account exempt from liability to contribute to the county expenditure in respect to lunatic paupers whose settlements cannot be ascertained, is not chargeable with the maintenance of such paupers sent from a parish in the borough to the borough asylum if it be liable to contribute to the county rate in respect of any other item of expenditure. *The Guardians of the Poor of Birmingham v. Beaumont*, 30 Law Tim. Rep. 270.

LUNATIC PRISONERS.—*Appeal against order of maintenance of insane prisoner—Notice*—3 & 4 Vic. c. 54, s. 11 & 12 Vic. c. 31.—The statute 3 & 4 Vic. c. 54 s. 5 (for the confinement and maintenance of insane prisoners) empowers the quarter sessions to hear and determine appeals against orders of maintenance

"in the same manner as appeals against orders of removal are now heard and determined." Held, that under this section the practice since 11 & 12 Vic. c. 31, must be regulated according to the provisions of that statute, and that the appellant has the twenty-one days mentioned in s. 9, within which to give notice of appeal. *Reg. v. The Justices of Glamorganshire*, 6 Week. Rep. 210.

MUNICIPAL CORPORATION.—*Lists of burgesses—Objection—Sufficiency of—Name of burgess—Mandamus.*—In the list of burgesses published by the town clerk, the names were entered alphabetically, the surnames first and the christian names after. In such list, one George Henry was inserted as Henry George, and in the notice of objection he was styled Henry George. At the revision it was objected, on the part of the burgess, that the notice of objection was invalid, as the name of the burgess was not Henry George; and the mayor and assessors, thinking the objection good, refused to hear the objection, and retained the burgess on the list: Held, that the notice of objection was good. *Reg. v. The Mayor of Wakefield*, 30 Law Tim. Rep. 273.

MUNICIPAL CORPORATION ACT.—*Revision of burgess lists—Refusal by mayor and assessors—F frivolous grounds—Mandamus to succeeding mayor.*—Section 18 of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, does not prevent the granting of a mandamus to hold a court for the complete revision of the burgess lists of a borough at some other time than between the 1st and 15th of October, when there has been a wrongful omission to make the revision at the proper time, and serious inconvenience may arise to individuals and the public from such wrongful omission. Where, therefore, the mayor and assessors of the year had refused to revise the burgess lists of particular parishes on frivolous grounds, a mandamus, tested in January of the next year, was granted to the succeeding mayor and the assessors, commanding them to hold a court and revise the said lists, and this for the purpose of deciding as to one of the lists upon the right of particular persons to have their names retained on the burgess roll. *The Queen v. The Mayor of Rochester*, 27 Law Journ. Q. B. 45.

NUISANCES.—*Removal Act—Local authority—Assessing property out of the jurisdiction.*—The local authority under the 18 & 19 Vic. c. 121, cannot assess property situate beyond the local limits for which they act, although such property causes the nuisance within such local limits, to abate which they have incurred the expense for which they have made the assessment. *The Hornsey Local Authority v. The Justices of Middlesex*, 30 Law Tim. Rep. 272.

POOR.—*Remedy for refusal to receive paupers—Mandamus.*—The proper remedy against a parish

overseer for refusing to receive a pauper under an order of justices is by indictment, and not by mandamus. *Exp. The Overseers of the Parish of Downton*, 6 Week. Rep. 224.

PUBLIC HEALTH ACT.—*Expenses—Retrospective rate—Mandamus.*—Sec. 89 of the Public Health Act (11 & 12 Vic. c. 63), enacts, that the local board may make and levy rates prospectively, in order to raise money for the payment of future charges and expenses; or retrospectively, in order to raise money for the payment of charges and expenses which may have been incurred at any time within six months before the making of the rate. In the following case, it appeared that expenses for works of a permanent nature, under sec. 86 of 11 & 12 Vic. c. 63, became due on 27th February. In June the contractors sued for their claim, and in July the local board gave a judge's order for payment of a reduced amount, with interest, in December. Payment not being made, the contractors obtained a rule nisi for a mandamus, in the following Easter Term, to compel the local board to make a rate for payment of the demand, which was made absolute in Trinity Term: Held, that the local board had power to enter into the judge's order, postponing the payment until December, and that the demand of the contractors then became a charge within sec. 89; and that the mandamus, being applied for within six months from that period, was a compliance with sec. 89. *Reg. v. The Rotherham and Humberworth Local Board of Health*, 30 Law Tim. Rep. 271.

EXAMINATION QUESTIONS.

(Hilary Term, 1858.)

PRELIMINARY.

I. Where, and with whom did you serve your clerkship? II. State the particular branch or branches of the law to which you have principally applied yourself during your clerkship. III. Mention some of the principal law books which you have read and studied. IV. Have you attended any, and what, law lectures?

COMMON AND STATUTE LAW AND PRACTICE OF THE COURTS.

I. State briefly the usual steps to be taken for the plaintiff in conducting an action in one of the superior courts, from its commencement to its termination, by execution after trial and verdict. II. Are there any degrees of secondary evidence? Give an instance to illustrate your answer. III. In what cases may entries in the writing of a deceased person be given in evidence to prove the facts stated in them? IV. What sort of counter-claims may

be set off between the same parties in actions of contract, and what cannot? V. How are the costs of the cause apportioned when the plaintiff has taken out of court money paid in by the defendant in respect of a particular claim or cause of action, but goes on for more, and is defeated as to the residue of his claim? VI. What communication upon his documentary evidence should an attorney have with the opposite party before going to trial, and what is the consequence of omitting to take the proper steps? VII. Describe an issue, and state how issues in fact and in law are respectively raised and tried? VIII. What does the plea of not guilty deny in actions of tort? IX. B. and C. were executors of A. deceased, and proved the will. B. died leaving C. surviving him—C. has since died intestate, and D. has taken out administration to the effects of C.; can outstanding debts due to the estate of A. be recovered in D.'s name, or who else is qualified to sue for them? X. Does a lien on goods or title deeds held as a security for a debt continue or come to an end when the right to recover the debt is barred by the Statute of Limitations? XI. What rights as to property have been conferred by recent legislation upon wives deserted by their husbands, and how may they be secured? XII. State very shortly the provisions of the "Common Law Procedure Act," 1854, as to Compulsory References; Attesting Witnesses; Injunctions. XIII. When the Statute of Frauds requires an agreement to be in writing, is it necessary that the consideration should appear on the agreement, or may it be supplied by parol testimony? XIV. What pleas may be pleaded together, without a judge's order? XV. How many days are meant in the expression, "Short notice of trial?"

CONVEYANCING.

I. Give a definition (as nearly as possible in the words of Littleton) of a tenant in fee-simple. II. Give a definition of a chattel real. III. Give an instance of a limitation in tail general, tail male, and special tail male, respectively. IV. In what respects do the covenants for title by a vendor and mortgagor respectively of an estate in fee-simple differ? V. What ceremonies are essential to the valid execution of a will? VI. A testator possessed of money in the funds, money out on mortgages of freehold and leasehold estates, railway shares, and other effects, desires to bequeath a legacy to an hospital—How ought the will to be framed to render the bequest effectual? VII. Land is limited to such uses as A. may appoint. A. appoints to B. and his heirs to the use of C. and his heirs in trust for D. and his heirs. What estates do B., C., and D. respectively take? VIII. An allotment of land is

awarded to A. in the inclosure of common field lands in lieu of A.'s previously existing rights—Is the purchaser of the allotment from A. entitled to any other evidence of A.'s title than the award of the commissioners and proof of their authority to make it? IX. B. purchases from A. fifteen acres of land in a hamlet, A.'s title deeds disclose a clear sixty years' title to fifteen acres of land in that hamlet—Ought anything more to be done by B. before he can safely take a conveyance from A. and pay the purchase-money? X. A., possessed of leaseholds for years, appoints B. and C. his executors; B. proves the will; C. renounces; B.'s executor afterwards sells the leaseholds to D.—Is any evidence of the title subsequent to A.'s death necessary beyond the probates of the wills of A. and B.? XI. What is the precise effect of an assignment to a purchaser of a "chase in action?" XII. In what circumstances can a purchaser enforce the specific performance of a contract not in writing for the purchase of land? XIII. Define a remainder and a reversion respectively? XIV. State the date and some of the provisions of the act for prevention of frauds and perjuries usually entitled the Statute of Frauds? XV. Give an instance of a case within the operation of the rule in Shelley's case?

EQUITY AND PRACTICE OF THE COURTS.

I. What jurisdiction does the Court of Chancery exercise as regards the persons and property of infants? II. How can an infant sue in equity? State what formalities are required previously to instituting a suit by an infant, and who is liable for the costs in the event of failure? III. State the different modes now in force of adducing evidence in a suit in Chancery with a view to the hearing of the cause, and what opportunities of cross-examination are afforded to the opposite party? IV. What steps can be taken to enforce an appearance in Chancery by a defendant who cannot be regularly served with a subpoena to appear and answer? V. What is the jurisdiction of the courts of equity in patent cases, and what is the relief usually prayed by a patentee whose rights have been infringed by piracy? VI. If A. contracts with B. for the purchase of a freehold estate, and afterwards refuses to perform his contract, what remedies has B. in equity, and in what respect do they differ from those to be obtained at law? VII. What defects in a contract for sale of freehold land will induce a court of equity to refuse relief to a vendor? VIII. If two suits are instituted by different creditors for the administration of the estate of a deceased person, will both be allowed to proceed? If not, what are the grounds on which the court will decide which of the two ought to go

on, and on what terms will the other be stayed? IX. How far is a decree made on the hearing of a cause binding, or how can it be made binding against a defendant who is abroad and does not appear? X. State generally in what cases relief can be obtained by summons before a judge at chambers. XI. Specify the different modes in which a subpoena to appear and answer [abolished] may be served, so as to enable a suit to proceed. XII. State shortly to what cases the act of 19 & 20 Vic. c. 120, so far as it authorises the grant of leases of settled estates, is applicable, and what is the general nature of the relief it affords? XIII. In what cases can a defendant in a suit in Chancery refuse to produce deeds, papers, or writings relating to the matters in question in the cause? XIV. What is the course of proceeding for transferring or paying trust funds into the Court of Chancery under the Trustees' Relief Act? To what cases does it apply, and to whom must notice be given? XV. What is the course of proceeding, on the part of persons beneficially entitled to the funds referred to in the last question, to enable them to get out the funds, and on whom must notice be served?

BANKRUPTCY AND PRACTICE OF THE COURTS.

I. Describe the persons liable to the bankrupt laws. II. How is an adjudication of bankruptcy obtained, and who is able to apply for it? III. What facts have to be proved in order to obtain an adjudication of bankruptcy? IV. Is there any, and what, rule as to the parties whose evidence or depositions are necessary to prove the several requisite facts? V. If a creditor holds a security for his debt, in what, if any, cases must he relinquish or surrender it, before being allowed to prove his debt? VI. What stamps and office fees are payable in bankruptcy proceedings? VII. Before whom should affidavits sworn abroad, to be used in our Courts of Bankruptcy, be made? VIII. Can debts owing by one partner alone be proved under a petition for adjudication against two partners, and what rights and powers will a creditor so proving obtain? IX. In whom is now vested the power of granting a certificate of conformity? X. At what stage of the bankruptcy proceedings can a certificate of conformity be obtained? XI. Is there any, and what, mode of arrangement or proceeding, without a bankruptcy, by which a trader can obtain a discharge from debts owing to dissentient creditors? XII. Mention the principal statutes that have affected or altered the laws relating to bankrupts during the last forty years, and the general effect of each, and also the principal statutes now in force relating to bankrupts? XIII. Mention the statute and sections of it relating to private arrange-

ments between traders and creditors? XIV. How does a joint stock company become liable to be proceeded against as bankrupts, and under what statutes? XV. What, if any, peculiar consequences ensue to a member of the House of Commons who is declared bankrupt, and in what cases, or at what time, and under what statutes?

CRIMINAL LAW AND PROCEEDINGS BEFORE MAGISTRATES.

I. Define embezzlement, and state in what respect it differs from larceny properly so called. II. Must the object for which a conspiracy was entered into be effected before an indictment for conspiracy can be sustained? III. Is an attempt to commit a statutable felony an offence, and of what character? IV. What is simony, and what are its consequences as respects the patron and clerk? V. Is a constable justified in arresting a person without a warrant, whom he reasonably suspects to have committed a felony? VI. In what way or ways can the invalidity of an indictment be taken advantage of, and before what court? VII. Enumerate some of the offences declared by the Bankrupt Law Consolidation Act, 1849, and the punishments awarded to them. VIII. Is there any general appeal from the decisions of justices in petty sessions, in any, and what cases? IX. State some of the offences over which Courts of Quarter Sessions have and have not jurisdiction? X. Can depositions in a criminal case, taken before magistrates, be used in evidence on the trial of the prisoner, under any, and what circumstances? XI. If a trustee fraudulently appropriates trust moneys, is he criminally responsible, and if so, at common law or by statute? XII. If a man draws a bill of exchange on a fictitious person, and accepts the bill in the name of such person, is that an offence, and if so, of what character? XIII. State the difference between the offence of stealing, and that of obtaining goods or money by false pretences. XIV. If a man publishes a libel, state the different modes of proceeding against him by the party libelled? XV. Under what circumstances are criminal informations granted, and by what court, and what advantage, if any, has this proceeding over that by indictment?

EXAMINATION ANSWERS.

(Hilary Term, 1858.)

COMMON LAW (*ante*, p. 309).

I. *Steps in a contested action.*—The following are the proceedings of a plaintiff in a defended cause, assuming it not to be commenced under the Bills of Exchange Summary Remedy Act; the plaintiff

issues the writ of summons, indorses it properly, and causes defendant to be served therewith, or if not served, applies for an order to proceed as if service had been effected; on the defendant's appearing, the plaintiff declares and delivers particulars of his demand if the writ was not specially indorsed; on the defendant pleading, the plaintiff replies; delivers an issue with notice of trial; notices to admit and produce documentary evidence; the *nisi prius* record and entry of cause for trial; subpoenas for witnesses and serving them; obtaining special jury and view, if necessary; the trial; moving afterwards for nonsuit, or new trial; signing judgment, taxing costs and issuing execution. There may also be an arrest of the defendant if he be about to leave the country, which will bring with it the subject of bail, as well putting in as justifying. Interrogatories for the examination of either party to the action may be delivered and must be answered within ten days by affidavit. So either party to the suit may obtain an order for the inspection of documents in the possession of the other party. And an injunction may be applied for in proper cases.

II. *Secondary evidence*.—There are no degrees of secondary evidence: an ordinary copy, or even oral evidence of the contents of a deed may be relied on though the party have an attested copy in his possession (First Book, 273; 1 L. C. 328; Doe v. Ross, 4 Jur. 321).

III. *Entries of deceased person*.—Where entries are made by a disinterested person in the course of discharging a professional or official duty, they are in general admissible in evidence after the death of the party making them. This principle extends to contemporaneous entries by a deceased shopman, clerk, or servant, in his employer's books in the ordinary course of business, such as of the delivery of goods, of the service of notices, &c. (Doe v. Turford, 8 B. and Adol. 890; Furness v. Cope, 5 Bing. 114; see Chambers v. Bernasconi, 1 C. M. and R. 368).

IV. *Set off*.—In order to be set off, there must be mutual debts between the parties, or if either party sue or be sued as representative between the testator or intestate and the other party. The debt to be set off must be a liquidated one (see 1 Law Chron. 23, 302; 3 Id. 223; Mardale v. Thelluson, 28 Law Tim. Rep. 160; Blakesley v. Smallwood, 15 L. J. Q. B. 111; Gordon v. Ellis, 15 Id. C. P. 178; Key, Exam. Com. L. 110—112).

V. *Money paid into court, costs*.—Where the plaintiff takes out of court a particular sum paid in by the defendant, and proceeds to recover more but fails, he will be entitled to the costs of the cause in respect of the part of his claim for which

the money was paid in, up to the time of its being paid in, but the successful defendant will be entitled to the costs of the cause in respect of his defence commencing with "Instructions for Plea" (R. G. Hil. Term, 1853, pl. 12).

VI. *Notice to admit*.—Besides seeking for the production of any documents in the possession of his opponent, or giving a notice to produce, an attorney should, with respect to documents in his possession, or that of his client, or of a third party, give the opposite attorney notice to admit the documents, and calling on him to admit or refuse to admit them on the trial. If this be omitted, the party for whom the attorney acts will not be allowed the costs of proof, unless the giving the notice would have cost more than the adducing of the evidence (R. G. H. T. 1853, pl. 29, 30; Key, Exam. Com. L. 118; First Book, 272, 273).

VII. *Issues*.—Issue is the end of the pleadings; for when the pleadings are brought to a point which is affirmed on the one side and denied on the other, the parties are said to be at issue. An issue must, therefore, consist of an affirmative and a negative, upon which a trial may be had, and the court give judgment. Issues are of two kinds: upon matter of law, or upon matter of fact. An issue joined upon matter of law is to be determined by the judges; and this is called a demurrer. Issues of fact are tried by a jury, except where, by the C. L. P. Act, 1854, s. 1, the parties to the cause agree to have them tried by the court or any judge thereof (1 L. C. 157, 328). It may be added, that by the C. L. P. Act, 1852, ss. 42—48, questions of fact and of law may be raised and determined without pleadings (1 L. C. 313, 328; 1 Jur. N. S. 49).

VIII. *Not guilty*.—In actions of tort, the plea of not guilty operates as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant (Plead. Rules, Hil. Term, 1853, pl. 16).

IX. *Surviving executor dying intestate*.—Where a surviving executor dies intestate, the administrator of the latter does not represent the original testator, and cannot therefore sue for outstanding debts of the original testator; there must be an administration *de bonis non* (1 L. C. 105; Toller, 68, 118, 4th ed.).

X. *Lien—Statute of Limitations*.—The statutes of limitation as to personal actions (unlike those relating to real property) do not extinguish the right, but only bar the remedy. It follows from this rule, that a party having a lien on goods or title deeds as a security for a debt does not lose his lien by reason of the statute of limitations having run against the debt. It is true the party cannot actively recover the money, but there is nothing to prevent his obtaining

payment through the medium of his lien (see *Higgins v. Scott*, 2 Barn. and Adol. 413).

XI. *Wives deserted by husbands*.—By the 20 & 21 Vic. c. 85, a wife deserted by her husband may apply in London to a police-magistrate, or in the country to justices in petty sessions, for protection; and after she has proved the fact of desertion without reasonable cause, and also that she is maintaining herself by her own industry or property, she may obtain an order by which her earnings and property, acquired since the desertion began, will be protected from her husband, and all creditors and other persons claiming under him. If the husband, or any person claiming under him, in defiance of such an order, seizes on any portion of the property secured by it, the wrongdoer will be liable, not only to restore the specific property, but also to pay double the value by way of damages. The husband, or any person claiming under him, may, however, apply to the court, or to the magistrate or justices by whom the order was made, to discharge it; but whilst it is in force the wife is to be exactly in the same position with regard to property as if she had obtained a judicial separation.

XII. *Compulsory references—Attesting witnesses—Injunctions*.—By the C. L. P. Act, 1854, ss. 3—17, power is given to the court, or a judge, before trial—on being satisfied that the matter in dispute consists wholly of accounts—either to decide the matter summarily, or to refer it to arbitration, reserving any special point of law or question of fact for the court or a jury; and, generally, powers are given to arbitrators to state a special case. The presiding judge at the trial of any case involving matters of account may refer the same to an arbitrator, an officer of the court, or a county court judge (First Book, 287; *ante*, pp. 27, 98). By s. 26 of the act, it is not necessary to prove by the attesting witnesses any document to the validity of which attestation is not requisite; where the document requires witnesses, they must be called, or their absence accounted for (*Roden v. R.*; 4 Q. B. R. 626; 1 L. C. 158, 453; First Book, 272). By the C. L. P. Act, 1854, ss. 79—82, in cases of breach of contract or other injury, where an action is pending, the plaintiff may claim a writ of injunction against the repetition or continuance of such breach of contract, or other injury, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right. On the writ and copy a notice is indorsed that, in default of appearance, the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain such injunction. The writ may be applied for at any stage of the cause at which it becomes necessary. An action may be brought

solely for an injunction, as well as be joined with a claim for damages or other redress (1 L. C. 162).

XIII. *Statute of frauds*.—In cases within the 4th section of the Statute of Frauds (except as to guarantees), the consideration must appear on the face of the agreement: not, indeed, in express terms, for it is sufficient if the agreement is so framed that it may be inferred from it that the consideration alleged by the party setting it up was the consideration upon which it was given (*Selw. N. P.* 846, 11th edit.; *Walford*, 1441; *Raikes v. Todd*, 8 Ad. and El. 846). By the 19 & 20 Vic. c. 97, s. 3, no consideration need be stated on the face of a guarantee (3 L. C. 88, 129, 210, 212).

XIV. *Pleas, leave*.—By the C. L. P. Act, 1852, s. 84, a defendant may plead the following pleas together, as of course, and without leave: *non assumpsit*, or *nunquam indebitatus*, tender as to part, Statute of Limitations, set-off, bankruptcy of defendant, discharge under Insolvent Act, *plene administravit*, *plene administravit præter*, infancy, coverture, payment, accord and satisfaction, release, not guilty; denial that the property, an injury to which is complained of, is the plaintiff's; leave and license, son assault demeane (*Williams' Plead.* 126, 127).

XV. *Short notice of trial*.—By R. G. H. T., 1853, pl. 35, the expression "short notice of trial" is, in all cases, to be taken to mean four days.

CONVEYANCING (*ante*, p. 310).

I. *Tenancy in fee simple*.—According to Littleton (s. 1), tenant in fee simple is he who hath lands or tenements to hold to him and his heirs for ever.

II. *Chattel real*.—An estate in lands which is limited to a certain number of years, or other determinate time not amounting to a freehold, is a chattel real (*Burt. pl.* 18).

III. *Estates tail, general, tail male, and special tail male*.—The following is a limitation in tail general: to A. and the heirs of his body begotten; tail male, to A. and the heirs male of his body begotten; special tail male, to A. and the heirs male of his body on Mary his now wife to be begotten (2 Bl. Com. 118; *Burt. Comp.* 244; *Doe v. Angell*, 10 Jur. 705, 709; *Key, Conveyanc.* 31, 32).

IV. *Covenants, sale, mortgage*.—In the case of a sale in fee simple, the vendor covenants for title as against his own acts, and if his title is derived through a testator, settlor or ancestor, against their acts; whilst a mortgagor covenants absolutely for title (5 Jarm. Conv. by Sweet, 545, 555; *Sudg. Vend. ch.* 9, s. 4; *Key, Conv.* 78, 156).

V. *Execution of will*.—The requisites to the due execution of a will (except as to the wills of soldiers and mariners on service relating to personalty (2 Law Stud. Mag. N. S. 48) are prescribed by sec. 9

of the 7 Will. 4, and 1 Vic. c. 26, and the 15 & 16 Vic. c. 24—namely, that the will must be in writing, and be signed at or near the foot or end thereof (see 1 Chron. p. 266; Re Rait, 14 Jur. 627), by the testator, or by some other person in his presence and by his direction; and such signature must be made or acknowledged by the testator, in the presence of two or more witnesses *present at the same time*; and such witnesses must attest and subscribe (and not formally acknowledge a previous signature, 13 Jur. 712) the will in the presence of the testator (and it is prudent that they should do so in each others' presence), but no form of attestation is necessary, though it is usual for probate purposes to have one stating that all the requisites of the statute have been complied with (1 Steph. Com. 553, 554, 1st edit.; p. 569, 2nd edit.; 27 Law Mag. 306—309).

VI. Legacy to charity.—Where a testator entitled to real and personal estate desires to leave a legacy to an hospital or other charitable institution, he should direct the legacy to be paid out of his pure personal estate (Robinson v. Geldart, 3 Mac. and G. 735; Tudor's R. Prop. 237; 1 L. C. 261, 262).

VII. Appointment to uses.—On an appointment of lands, under a power, to B., to the use of C. in trust for D., B. has the legal estate and D. the beneficial interest: the appointment being the mere limitation of a use cannot be executed by the statute, as that would be to allow a use upon a use (Key, Conv. pp. 123, 124; Hay. Conv. 37, 53, 74, 5th edit.).

VIII. Allotment under Inclosure Act—Title.—We do not perceive anything in the acts relating to the inclosure of common field lands to take the case out of the ordinary rule, and, therefore, the allottee, in the absence of a stipulation to the contrary, must abstract and verify a full title of sixty years, though much beyond the date of the award, the rule being that upon the sale of lands allotted under an Inclosure Act, the abstract down to the award must be that of the title to the lands in respect of which the allotment was made (Sugd. Vend. 439, 11th edit.; King v. Moody, 2 Sim. and Stu. 572; Mayor v. Ward, 5 Hare, 604; 3 David. Conv. 58, 1st edit.; Dart, 104, 188, 3rd edit.).

IX. Identity of lands purchased.—Before the purchaser accepts a conveyance and pays his purchase money, he ought to require evidence that the fifteen acres of land to which a title is shown are the same as those he contracted to purchase.

X. Renouncing executor, and death testate of survivor.—Supposing this case not to be affected by the 20 & 21 Vic. c. 77, s. 79, it would be necessary to ascertain that C., the renouncing executor, did not survive B., the proving executor; for if he did, the executor of B. would not represent the original

testator (Re Collett, 3 Jur. N. S. 72; 3 L. C. 304). We find on referring back to pp. 11, 66, that we made a mistake in answering this question, and most unaccountably persisted in it when our attention was called thereto by a correspondent, but the real fact is that we misunderstood the question, as will be seen by the authorities quoted at p. 67, which confirm our correspondent, to whom we owe an apology. We are surprised no others of our intelligent readers drew attention to the subject. The 20 & 21 Vic. c. 77 (the Probate Court Act) enacts (s. 79) that if any person, *after the commencement of the act*, renounces probate of the will of which he is executor, his rights in respect of the executorship shall wholly cease, and the representation to the deceased and the administration of his effects shall go, devolve, and be committed as if such person had not been appointed executor (First Book, 229).

XI. Assignment of chose in action.—An assignment of a chose in action passes nothing at law, but in equity it is effectual, so as to give all the rights of the assignor to the assignee, making the trustee or debtor of the former to be the trustee or debtor of the latter: as between the parties the transaction is complete by the mere assignment, but as to third persons purchasing for value without notice, it is the notice to the trustee or debtor which completes the transaction and gives priority (Beavan v. Oxford, 2 Jur. N. S. 121; 5 Week. Rep. 275; 3 L. C. 141, explaining the case of Watts v. Porter; 1 L. C. 93; 2 Id. 75—78).

XII. Specific performance, no writing.—Specific performance of an unwritten contract for the purchase of land, where the defendant has taken possession of the land under the terms of the agreement will be enforced, this amounting to part performance. So also where the defendant by his answer admits a binding contract and does not claim the benefit of the Statute of Frauds (1 L. C. 438, 439; Dart, 656, 662, 3rd edit.; Dale v. Hamilton, 5 Ha. 381; Ridgway v. Wharton, 3 De G. M. and G. 677).

XIII. Remainder and reversion.—A remainder is an estate limited to commence after the determination of a particular estate, previously limited by the same deed or instrument out of the same subject of property; or, as Lord Coke defines a remainder, it is "a remnant of an estate in lands or tenements expectant on a particular estate, created together with the same at one time" (1 Inst. 143). In defining a remainder, Noy, in his *Maxims*, describes it to be "the residue of an estate at the time appointed over, and that must be grounded on some particular estate." And it should seem, a remainder may be limited by one of two deeds made at the same time, and operating as part of the

same assurance (see further, Burton's Comp. pl. 21). For the information of students it may be remarked that the word "remainder" is not a term of art—i.e., the use of it is not at all necessary, nor, indeed, usually employed in the creation of an estate. An estate in reversion is where any estate is derived by grant or otherwise, out of a larger one, leaving in the original owner an ulterior estate immediately expectant on that which is so derived; the latter interest is called the particular estate (as being only a small part or particular of the original one), and the ulterior interest, the reversion. Thus, upon the creation by the owner of the fee, of any estate in tail, for life, or for years, the residue undisposed of is described as the reversion expectant upon the particular estate in tail, for life, or years so created (Burton's Comp. pl. 28, 29, 30).

XIV. *Statute of Frauds*.—The Statute of Frauds was passed in the twenty-ninth year of Charles II. It provides that no verbal promise shall be sufficient to ground an action upon,—1, where a personal representative contracts to answer damages out of his own estate; 2, where a person guarantees the debt, &c., of another; an agreement in consideration of marriage; contracts for the sale of any interest in lands and leases for the term of more than three years from the making (which latter must, by the 8 & 9 Vic. c. 106, be by deed); an agreement not to be performed within a year (First Book, 206; 3 L. C. 46, 90; Dobson v. C., 5 W. R. 512).

XV. *Rule in Shelley's case*.—An estate is limited to A. for life, remainder to his heirs (or heirs of the body); the remainder, by the rule in Shelley's case, is executed in A., and his heirs take by descent and not by purchase (Fearn, 28—208; 1 Prest. Est. 263—418; Watk. Conv. by White, 106—110; Key, Conv. 26; 3 L. C. 10; First Book, 150).

EQUITY (ante, p. 310).

I. *Infants, protection of*.—Where infants have property within the jurisdiction of a court of equity, the court, on a bill being filed for their control and protection, make them wards of court, whereby an infant is placed under the more immediate protection of the court, which then takes the direction of his estate, and appoints a guardian for his person only. Practically the court acts only where the infant has property, but the Lord Chancellor has said that the cases in which the Court of Chancery interferes on behalf of infants are not confined to those in which there is property (Re Spence, 2 Phill. 247; S. C. 11 Jur. 399; 16 Law Journ. N. S. Chanc. 309; 2 Fonbl. Treat. Eq. b. 2, pt. 2, c. 2, s. 1; 2 Steph. Com. 342, 1st edit.; p. 290, 2nd edit.; 1 Hamm. Eq. Dig. 682; Princ. Eq. 391).

II. *Infant suing*.—An infant sues in equity by his

next friend. The next friend must sign a written authority to the solicitor for using his name, which must be filed with the bill (15 & 16 Vic. c. 86, s. 1—6; 2 L. C. 345, 373). The next friend is liable for the costs of the suit.

III. *Evidence*.—The parties to a suit may file affidavits or examine witnesses orally, or may take both courses (Order of 13th Jan. 1855; 1 L. C. 337, 338; 2 Id. 196). A person who is an affidavit witness may be cross-examined within one month after the closing of the evidence; whilst witnesses orally examined must be cross-examined within that period (5th Ord. of 13 Jan. 1855; 1 L. C. 337; First Book, 287, 288; 15 & 16 Vic. c. 86, s. 38; Evans v. Coventry, 27 Law Tim. Rep. 39; Clarke v. Lawe, 2 Jur. N. S. 228; 2 L. C. 372).

IV. *Non-appearance by defendant*.—If a defendant cannot be served with a copy of the bill (the subpoena is abolished) the plaintiff either applies to the court to direct substituted service, or to treat him as having absconded to avoid process: in the latter case the court orders the defendant to appear at a certain day, a copy of which order is inserted in the *London Gazette*, and then, if the defendant does not appear, the court may direct an appearance to be entered for the defendant, and the bill, in default of answer, may be taken *pro confesso* (First Book, 284; 31st and 79th Ord. May, 1845; 1 L. C. 92, 307; 3 Id. 128; Reed v. B., 5 Week. Rep. 793).

V. *Patents, protection, &c.*—In patent cases, courts of equity interpose to prevent an infringement of the patentee's rights where the patent has been established at law, or is not disputed; and even where it has not been established at law, they will in many cases direct the defendant to keep an account of his profits pending the proceedings at law (Lester v. Eastwood, 26 Law Tim. Rep. 4; 2 L. C. 159, 232; 1 Id. 136). After the right is determined or the patent is submitted to, a court of equity will grant an injunction, and as consequent thereon, an account of the profits made by the defendant (Smith v. London, &c., Co., 23 L. J. Ch. 562; 2 L. C. 232). The bill of the patentee usually prays for both an injunction and an account of the profits.

VI. *Contract—Specific performance*.—Where a purchaser of real estate refuses to perform his contract, the vendor may take proceedings in equity to compel him to specifically perform his agreement by completing the purchase. At law the vendor could obtain damages only (Benson v. P., 2 Jur. N. S. 425; First Book, 258, 281; 1 L. C. 317; Burt. Comp. pl. 1582).

VII. *Specific performance refused*.—Specific performance of a contract for sale will be refused where there is a personal incapacity to contract on the part of the defendant; where the contract has been

entered into for an illegal purpose; where the agreement being by an agent omits the usual and proper stipulations in favour of the principal; where the contract has been procured to be entered into by fraud, duress, surprise, misrepresentation, concealment, or even a common mistake; where the whole material parts of the contract cannot be carried into execution (3 L. C. 43, 121); where the terms are doubtful, or the purchaser has been deceived in any material respects (see Dart, Ch. 18, ss. 8, 9, 3rd edit.).

VIII.—*Two administration suits*.—Where two administration suits are instituted by different creditors, both will be allowed to proceed until one obtains a decree, and then on application of the defendant in that suit the court will stay the proceedings in the other suit; if the suits are in different courts, a transfer of the suit to be stayed should be obtained (*Duffort v. A.*, 5 W. R. 241; 3 L. C. 297). It must be shown that all the relief claimed in the second suit can be obtained under the decree in the first; and in general the plaintiff in the second suit is entitled to his costs up to notice of the decree in the other suit.

IX. *Decree, binding — Non-appearing defendant abroad*.—Where a decree is made in a cause in which a defendant who is abroad has not appeared, an office copy of it should be served on the defendant or his solicitor, and if the decree be not absolute, a notice should be served therewith to the effect that if the defendant wishes to set aside the decree, application must be made to the court within a limited time. If the decree and notice be served, the decree will be absolute after the time mentioned in the order, if the defendant does not set aside the decree; if not served, it will be absolute within three years (*Orders*, 1845, pl. 68, 81—90).

X. *Summons at chambers*.—Relief may be obtained by summons at chambers in administration cases. Thus creditors, or legatees, or next of kin may proceed by summons against the executors or administrators of the estate of a deceased person in respect of personal estate only, and so may creditors only against the real estate of the deceased (15 & 16 Vic. c. 86, ss. 45, 47; 1 L. C. 54, 262, 408; *First Book*, 288).

XI. *Service of bill*.—A bill may be served by delivering a copy to the defendant, or leaving it at his dwelling-house with a servant there (*Pycroft v. Williams*, 5 Week. Rep. 464; 3 L. C. 399). So the court on application may direct substituted service in such manner and in such cases as it shall think proper (15 & 16 Vic. c. 86, s. 5; *Hope v. Hope*, 23 Law Tim. Rep. 198; *Bone v. Angier*, 4 Week. Rep. 609; *Steele v. Gordon*, 24 Law Tim. Rep. 207; 1 L. C. 92, 307; 3 Id. 128; *Reed v.*

Barton, 5 W. R. 793). Where the defendant is abroad, the court may order service out of the jurisdiction (83rd Order of May, 1845).

XII. *Settled Estates Act*.—The 19 & 20 Vic. c. 120, has for its object the empowering the Court of Chancery to authorise leases and sales of settled estates, where such leases and sales shall be deemed in the words of the preamble proper and consistent with a due regard for the interests of all parties entitled under the settlement (which includes a will, or other instrument by virtue of which any hereditaments are limited in trust by way of succession), and also to enable persons in possession of land for certain limited interests to grant agricultural or occupation leases thereof, at rack-rent, for a reasonable period. The following conditions are to be observed in the execution of the act, with regard to granting leases of settled estates:—*First*, the lease must be made to take effect in possession at or within one year after the making, and be for a term of years not exceeding for an agricultural or occupation lease twenty-one years, for a mining lease, or a lease of water, water mills, wayleaves, waterleaves, or other rights or easements, forty years, and for a building lease ninety-nine years, or where the court is satisfied that it is the usual custom of the district and beneficial to the inheritance to grant building leases for longer terms, then for such term as the court shall direct. *Secondly*, on every such lease must be reserved the best rent, or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, payable half-yearly or oftener, without taking any fine or other benefit in the nature of a fine. *Thirdly*, where the lease is of any earth, coal, stone, or mineral, a certain portion of the whole rent or payment reserved must be from time to time set aside and invested as hereinafter mentioned—namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate, or by virtue of any declaration in the settlement, is entitled to work such earth, coal, stone, or mineral for his own benefit, one-fourth part of such rent, and otherwise three-fourth parts thereof; and in every such lease sufficient provision must be made to insure such application of the aforesaid portion of the rent, by the appointment of trustees or otherwise. *Fourthly*, no such lease is to authorise the felling of any trees, except so far as necessary for the purpose of clearing the ground for any buildings, excavations, or other works authorised by the lease. *Fifthly*, every such lease must be by deed, and the lessee must execute a counterpart; and every such lease must contain a condition for re-entry on non-payment of the rent for a period not less than twenty-eight days after it becomes due. The leases

may be required to contain such special covenants as the court shall deem expedient (sec. 3). The court may itself determine the form of particular leases, or vest the power in trustees (sec. 7). Tenants for life may grant leases for twenty-one years, provided the best rent be reserved that can reasonably be obtained without fine or other benefit in the nature of a fine (sec. 32), which are to be valid against the persons mentioned in sec. 33.

XIII. Production of papers not directed.—Production of documents will not be ordered where—1, they are privileged communications; 2, where they are the defendant's title deeds, and relate exclusively to his title, and not to the plaintiff's case; 3, where the defendant has not the sole and uncontrolled right over the documents, but some other person, not a party to the suit, has an interest therein (*Taylor v. Rusdell*, Cr. and Ph. 111; *Wroughton v. Barclay*, 11 Jur. 274; *Bolton v. Liverpool*, 1 My. and Ke. 88; *Combe v. London*, 6 Jur. 571; *Feile v. Stoddart*, 13 Jur. 225, 373; *Flight v. Robinson*, 13 L. J. Ch. 425).

XIV. Trustees paying trust moneys into court.—On paying trust money, or transferring trust stock into court, the trustees make and file an affidavit stating the facts, and after the payment or transfer, they give notice to the parties mentioned in the affidavit as being the persons interested in, or entitled to, the trust money or stock (2 L. C. 161, 300, 373; 8 Id. 184, 286, 317; 12 Jur. pt. 2, pp. 241, 249, 345; *Key Exam. Equity*, 68, 69).

XV. Getting trust moneys, &c., out of court.—In order to obtain payment of trust moneys which have been paid into court, the cestui que trusts, if the amount be under £300, may apply at chambers, but if above that amount, they must apply to the court by petition. In either case the trustees must be served with notice of the application. No bill can, without leave, be filed, in respect of the fund paid in, or transferred (*Goode v. West*, 15 Jur. 1025; 14 Jur. 52; *Key Equity*, 69; *Ord.* 12th Nov., 1856, pl. 3; 3 L. C. 170).

BANKRUPTCY (*ante*, p. 311).

I. Traders.—The persons liable to the bankrupt laws are traders, and the Bankruptcy Consolidation Act, 1849, contains an enumeration of several trades (see 1 L. C. 140). In addition, the statute contains a general description of a trader, as a person "seeking his living by buying and selling," or "using the trade of merchandise, by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail" (*Key, Bankr.* 12; 1 L. C. 140—145; *Henley's Bankr.* 3, 3rd edit.; *Exp. Lavender*, 4 D. and C. 484).

II. Adjudication, how obtained.—An adjudication

may be obtained by the trader himself, if he can show £150 assets, or by a creditor to the amount of £50 (1 L. C. 262, 284—289; *First Book*, 217). In either case a petition for adjudication is presented, duly verified, to the proper court, and on due proof, in the case of a creditor petitioning, of his debt, the trading, and an act of bankruptcy, an adjudication is made (12 & 13 Vic. c. 106, s. 101).

III. Proofs to obtain adjudication.—In the case of a creditor petitioning for adjudication, there must be proof of the debt of the petitioning creditor, or other creditor prosecuting the petition, of the trading, and of the act of bankruptcy (*Key, Bankr.* 47). Witnesses may be summoned to give evidence (12 & 13 Vic. c. 106, s. 101). The petitioning creditor's debt is investigated, and all securities exhibited, together with a debtor and creditor account (*Rule* 11 of 19th Oct., 1852).

IV. Parties to prove the facts.—In general the petitioning creditor attends and proves his debt, and the trading and act of bankruptcy are proved by witnesses; but by *Rule* 12 of 19th Oct., 1852, the personal attendance of the petitioning creditor, and of the witness or witnesses, to prove the trading and act of bankruptcy, upon the opening of the petition for adjudication, may be dispensed with, on special cause proved to the satisfaction of the court.

V. Proof—Creditor holding security.—Where a creditor holds a security given by the bankrupt alone for his debt, he must, before proving, give up such security (*Henley's Bankr.* 104 et seq., 3rd edit.; *Key, Bankr.* 104). If, however, the creditor hold as a security for his debt a mortgage or other security of property not belonging to the bankrupt, and not given by him, the creditor may prove his debt without affecting such security. The reason is, that having taken the precaution of requiring the security of a third person, he is not to be deprived of it by a petition against his debtor, and particularly as the creditors would not be benefited by his relinquishing his security.

VI. Stamps and fees.—This is a curious question for an articulated clerk to be required to answer: the best memory will certainly have the best chance. There is payable, on every petition for adjudication or arrangement, &c., the sum of £10; on every declaration of insolvency, trader-debtor summons, and admission or deposition by the trader-debtor, 2s. 6d.; on every bond with sureties, 5s.; on every search (except for a sitting or meeting), 1s.; on every allocatur for costs, a certain per centage; on office copies, 1½d. per folio of ninety words. The official assignee has to pay a certain per centage to the credit of the account intitled "The Chief Registrar's Account" (1 *Law Chron.* 138, 139).

VII. Affidavits sworn abroad.—Affidavits made in

Scotland or Ireland should be sworn before a commissioner for taking affidavits, or before a magistrate of the county, city, town, or place where any such affidavit is taken, or *elsewhere* before a magistrate, and attested by a notary, or before a British minister, consul, or vice-consul (12 & 13 Vic. c. 106, s. 243; 1 L. C. 000; Exp. Bird, 22 L. J. Bankr. 4).

VIII. *Proof—Partners.*—Debts owing by one partner alone may be proved under a petition for adjudication against two partners, but only in the first instance, as against the separate estate of the debtor, the rule being, that where partners become bankrupt, and there is separate as well as joint property, and also joint and separate creditors, distinct accounts are kept of the joint estates, and also of the separate estates; and what is found to belong to the separate estates, is applied, in the first place, in or towards satisfaction of the debts of the respective separate creditors; and in case there be any overplus of the joint estate, after all the joint creditors are paid and satisfied their whole demands, the shares of the bankrupts in such overplus are to be applied in or towards satisfaction of their separate creditors; in case there is any overplus of the separate estates, after all the separate creditors shall be paid and satisfied their whole demands, the overplus of such separate estates is to be carried to the account of the joint estate, and to be applied in or towards satisfaction of the joint debts (Mont. and Ayr. Bankr. Pract. 318; Exp. Green, 1 Deac. and Chitty, 882; Exp. Bolton, Buck, 7; Henley's Bankr. 174, 3rd edit.). A separate creditor is not entitled to interest out of the surplus till the joint creditors are paid (Exp. Minchin, 2 Glyn and Jam. 287; Archb. Bankr. 411, 8th edit.).

IX. & X. *Grant of certificate.*—Before a bankrupt applies for his certificate he must have passed his last examination (12 & 13 Vic. c. 106, s. 198). The commissioner acting in the prosecution of the bankruptcy grants the certificate of conformity, but any creditor may be heard to oppose same on giving three clear days' notice of his intention to oppose. In order to obtain a certificate the court (commissioner) appoints a public sitting for the allowance thereof; an advertisement thereof is then inserted in the *London Gazette*, and notice thereof given to the solicitor of the assignees, twenty-one days before the sitting. The assignees, or a creditor having given due notice, are then heard to oppose, and the court either grants, or refuses to grant, or suspends the certificate. The certificate, if granted, may be (1) one of a *first class*, which is granted where the bankruptcy has arisen from unavoidable losses and misfortunes, or (2) one of a *second class*—i. e., where the bankruptcy has not *wholly* arisen from unavoidable losses and misfortunes, or (3) the

certificate may be of a *third class*, which is where the bankruptcy has *not* arisen [in any part] from unavoidable losses or misfortunes (see 12 & 13 Vic. c. 106, s. 199, and Schedule Z.).

XI. *Arrangements.*—A trader may obtain a discharge from his debts without bankruptcy, by petitioning for protection, or, as it is called, for arrangement under the provisions of the Bankruptcy Consolidation Act, or by arrangement by deed under the same act. In each case a large proportion of the creditors must assent, upon which the minority will be bound (1 L. C. p. 77).

XII. *Bankruptcy statutes.*—Another test of a good memory. The principal statutes relating to bankruptcy during the last fifty years are the 6 Geo. 4, c. 16; 1 & 2 Will. 4, c. 56; 3 & 4 Will. 4, c. 47; 5 & 6 Will. 4, c. 29; 1 & 2 Vic. c. 110; 2 Vic. c. 11; 2 & 3 Vict. c. 29; 5 & 6 Vic. c. 122; 7 & 8 Vic. c. 96; 8 & 9 Vic. c. 102; 8 & 9 Vic. cc. 102 and 127. The several joint-stock acts relating to bankruptcy: 10 & 11 Vic. c. 102; 11 & 12 Vic. c. 86; 14 & 15 Vic. c. 52; 15 & 16 Vic. c. 77; 16 & 17 Vic. c. 81. The short particulars of these acts may be seen 1 L. C. 6—8.

XIII. *Statute for private arrangements.*—This is another question for very good memories. The arrangements which take place under the control of the court are by virtue of the Bankruptcy Consolidation Act, 1849, ss. 211—223, and those by deed are by the same statute, secs. 224—229.

XIV. *Joint-stock companies.*—In order to obtain an adjudication of bankruptcy against a joint-stock company, a creditor not having a judgment, &c., must (7 & 8 Vic. c. 111, s. 7) file an affidavit of debt, of a proper amount, in a court of law, and sue out a writ of summons, which must be served on the chief clerk, &c., of the company. If the company do not, within one calendar month, pay, &c., such debt, or make it appear to a judge that it is their intention to defend the action upon the merits, and enter an appearance accordingly, the company will be deemed to have committed an act of bankruptcy (see Exp. Gillett, 28 Law Tim. Rep. 68, 53; 3 Law Chron. 187, 193, 254, 267, 333). By ss. 5 and 6, creditors having a judgment or decree, &c., may serve a fourteen days' notice requiring payment. So by s. 4, the company itself may resolve that it is unable to meet its engagements, and that shall be an act of bankruptcy. Now, however, the affairs of joint-stock companies are usually wound up under 11 & 12 Vic. c. 45; 12 & 13 Vic. c. 108; 19 & 20 Vic. c. 47; and 20 & 21 Vic. c. 14.

XV. *Members of Parliament.*—The consequences to a member of Parliament from his being found bankrupt are, that he is incapable of sitting or voting for twelve months, unless the petition for adjudica-

tion be within that time superseded, or the debts paid in full; if this be not done after twelve months, the commissioners are to certify to the speaker, whereon the seat is vacated, and a new writ is to issue (52 Geo. 4, c. 144, ss. 1 and 2; 2 Steph. Com. 340, 2nd edit.; Mont. and Ayr. Bankr. Pr. 116, 716, 2nd edit.). During the time of his privilege he is not liable to be arrested or imprisoned, except in cases made felony or misdemeanor. This is by sec. 66 of the Consolidation Act, which enacts that if any trader, subject to the bankrupt laws, having privilege of Parliament, shall commit any act of bankruptcy, he may be dealt with under that act in like manner as any other trader, but he is not to be subject to be arrested or imprisoned during the time of such privilege, except in cases made felonies or misdemeanors by that act. This liability to arrest, in cases of misdemeanor, is new: the 6 Geo. 4, c. 16 (now repealed), only subjected a member of Parliament trader to imprisonment in cases of felonies.

CRIMINAL LAW (*ante*, p. 311).

I. *Embezzlement and larceny*.—Embezzlement is where one in a public trust, or as a servant, receives and fraudulently appropriates money or goods received for public purposes or for his master, without the same having been in the possession of the party entitled thereto (Dickinson's Quart. Sess. 261, 355, 5th edit.). Embezzlements by persons employed by the party whom they defraud are distinguished from larceny properly so called (see definition, 14 Jur. Dig. 54), as being committed in respect of property which is not at the time in the actual or legal possession of the owner (Reg. v. Butler, 2 Car. and Kirw. 340; Reg. v. Aston, 2 Id. 413; Reg. v. Hawkins, 14 Jur. 513).

II. *Conspiracy, effecting object*.—An indictment for conspiracy may be supported, although the unlawful object for which it was entered into be not effected; for the offence is deemed to consist rather in the guilty combination or agreement, than in the act by which it is carried into effect (9 Co. Rep. 56 b; Rex v. Best, Salkeld, 174; 4 Steph. Com. 294, 2nd edit.). It is, indeed, usual to set out the overt acts, i. e., those acts which may have been done by any one or more of the conspirators, in order to effect the common purposes of the conspiracy. But this is not essentially necessary (Rex v. Gill, 2 Barn. and Ald. 204; Rex v. Seward, 1 Ad. and Ell. 706; 5 Qu. Ben. Rep. 49; Archb. Crim. Plead. and Evid. 675, 10th edit.).

III. *Attempts to commit felony*.—An attempt to commit a felony, if done under such circumstances, that, had the attempt succeeded, the defendant might have been convicted of the felony, is a mis-

demeanour (9 Geo. 4, c. 31, s. 25; 14 & 15 Vic. c. 100, s. 9; Key Exam. Crim. Law. 46).

IV. *Simony*.—Simony is the corrupt presentation of any one to an ecclesiastical benefice, for money, gift, or reward (Cro. Eliz. 790). It was by the canon law a very grievous crime, but whether it was an offence punishable by the common law has been doubted (2 Bl. Com. 278; 5 Taunt. 745; 3 Steph. Com. 70, 2nd edit.), and although the clerk who committed simony was always subject to ecclesiastical censures, these were not efficacious enough to repel the notorious practice of the thing; particularly as they did not affect the simoniacal patron; so that several acts of Parliament have made the offence operate as a forfeiture of the right of presentation, which thereby is vested *pro hac vice* in the crown (3 Steph. Com. 120, 1st edit.; p. 70, 2nd edit.; 1 L. C. 178). By 31 Eliz. c. 6, if any patron, for money, or any other corrupt consideration or promise, directly or indirectly given, shall present, admit, institute, induct, instal, or collate, any person to an ecclesiastical benefice or dignity, both the giver and the taker shall forfeit two years' value of the benefice or dignity; one moiety to the King, and the other to any one who will sue for the same: and the presentation of the clerk shall be void. A bond may be taken to secure the resignation of a living in favour of any one person whomsoever, and in favour of any two persons, being the near relations of the patron (9 Geo. 4, c. 94; 3 Steph. Com. 121, 1st edit.; p. 73, 2nd edit.; 1 L. C. 178).

V. *Arrest by constable on suspicion*.—A constable is justified in arresting a person reasonably suspected of a felony, though not if of a mere misdemeanor, except it be in the night time, under the 2 & 3 Vic. c. 47, ss. 63—65 (Bowditch v. Balkin, 19 Law Journ. Ex. 337).

VI. *Objecting to validity of indictment*.—Where an indictment is so defective that no judgment can be given upon it, even should the defendant be convicted, it will be quashed. The application is made to the court where the bill is found, except in cases of indictments at the sessions, or in other inferior courts, in which cases the application is made to the Court of Queen's Bench, the record being previously removed there by certiorari. The more usual course is to bring a writ of error (Archb. Crim. pl. 63—65, 8th edit.; 7 Term Rep. 373; 8 & 9 Vic. c. 68; 9 & 10 Vic. c. 24; 16 & 17 Vic. c. 32; 17 Jur. 1097; Key, Exam. Crim. L. 115, 116).

VII. *Offences by bankrupt*.—By the Bankruptcy Consolidation Act, 1849 (the 12 & 13 Vic. c. 106), s. 251, if a bankrupt wilfully fail to attend to pass his last examination on the day appointed, after notice to him and in the *London Gazette*, he will be guilty of a felony, and be liable to transportation for

life, or for such term, not less than seven years, as the court before which he shall be convicted shall adjudge, or will be liable to imprisonment, with or without hard labour, for any term not exceeding seven years (see as to penal servitude, *ante*, p. 138). By s. 252 of the Bankruptcy Consolidation Act, "if any bankrupt shall, after an act of bankruptcy committed, or in contemplation of bankruptcy, or with intent to defeat the object of the law relating to bankrupts, destroy, alter, mutilate or falsify any of his books, papers, writings, or securities, or make or be privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors, every such bankrupt shall be deemed guilty of a misdemeanor, and on conviction be liable to imprisonment for any term not exceeding three years, with or without hard labour." By sec. 253, if any bankrupt shall within three months next preceding the filing of the petition for adjudication, under the false colour and pretence of carrying on business and dealing in the ordinary course of trade, obtain on credit from any other person any goods or chattels with intent to defraud the owner thereof, or if within such time or with such intent he knowingly remove, conceal, or dispose of any goods so obtained, every such bankrupt is guilty of a misdemeanor, and may be imprisoned for not more than two years, with or without hard labour.

VIII. *Appeals from justices.*—By the 20 & 21 Vic. c. 43 (*ante*, pp. 142, 144), it is provided (s. 2), that after the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way by any law now in force or hereafter to be made, either party to the proceeding before the said justice or justices may, if dissatisfied with the determination as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of one of the superior courts of law, to be named by the party applying; and such party, who may be called "the appellant," shall, within three days after receiving such case, transmit the same to the court named in his application, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given, who may be called "the respondent." By s. 3, "the appellant, at the time of making such application, and before a case shall be stated and delivered to him by the justice or justices, shall in every instance enter into a recognisance before such justice or justices, or any one or more of them, or any other justice exercising the same

jurisdiction with or without surety or sureties, and in such sum as to the said justice or justices shall seem meet, conditioned to prosecute without delay such appeal, and to submit to the judgment of the superior court, and pay such costs as may be awarded by the same; and thereupon the appellant, if then in custody, shall be liberated upon the recognisance being further conditioned for his appearance before the same justice or justices, or if that be impracticable, before some other justice or justices exercising the same jurisdiction who shall be then sitting, within ten days after the judgment of the superior court shall have been given, to abide such judgment, unless the determination appealed against be reversed."

IX. *Quarter sessions—Jurisdiction.*—The quarter sessions had jurisdiction to try all felonies and all misdemeanors, except perjury and forgery, at the common law; but in capital felonies it was not usual to proceed at the sessions. And now, by the 5 & 6 Vic. c. 38, s. 31, neither the justices of the peace acting in and for any county, riding, &c., nor the recorder of any borough, shall at any session of the peace, or at any adjournment thereof, try any person or persons for any treason, murder, or capital felony, or for any felony, which, when committed by a person not previously convicted of felony, is punishable by transportation beyond the seas for life, or for any of the following offences:—1. Misprision of treason. 2. Offences against the Queen's title, &c., or against either House of Parliament. 3. Offences subject to the penalties of *præmunire*. 4. Blasphemy, and offences against religion. 5. Administering or taking unlawful oaths. 6. Perjury, or subornation of perjury. 7. Making, or suborning any other person to make, a false oath, affirmation, or declaration, punishable as perjury, or as a misdemeanor. 8. Forgery. 9. Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern. 10. Bigamy, and offences against the laws relating to marriage. 11. Abduction of women and girls. 12. Endeavouring to conceal the birth of a child. 13. Offences against any provision of the laws relating to bankrupts and insolvents. 14. Composing, printing, or publishing blasphemous, seditious, or defamatory libels. 15. Bribery. 16. Unlawful combinations and conspiracies, except such over which such justice or recorder respectively have or has jurisdiction to try, when committed by one person. 17. Stealing, or fraudently taking, or injuring, or destroying records or documents belonging to any court of law or equity, or relating to any proceeding therein. 18. Stealing, or fraudently destroying or concealing, any wills or testamentary

papers, or any document or written instrument, being, or containing, evidence of the title to any real estate, or any interest in lands, &c. Some other statutes also provide that the offences to which they relate shall not be tried at the session.

X. Depositions—Evidence.—The depositions of a witness taken before a magistrate in a case where he has authority to take them, are evidence in case of the death of the witness, provided the depositions have been duly taken; that is, taken in the presence of the defendant, on the oath of the accuser and witnesses, and reduced into writing, and signed by the witness and justice; in which case the depositions will be admissible, although the witness was not at the time apprehensive of approaching dissolution. And the information of an accomplice duly taken, may, in case of his death, be read in evidence against the prisoner, although it will not be conclusive, unless corroborated by other testimony (*R. v. Paine*, Salk. 281; 1 Hale's Pl. C. 586; 1 Leach, 502; Archb. Crim. Pl. and Evid. 130, 8th edit.; *Reg. v. Arnold*, 8 Car. and Pay. 621; 11 & 12 Vic. c. 42, s. 17; 18 Jur. 1058; *Reg. v. Walsh*, 5 Cox's Crim. Cas. 115; *Reg. v. Hyde*, 3 Id. 90). There is a similar provision in case of the illness of a witness, or of his not being to be found (see *Reg. v. Hendy*, 4 Cox's Crim. Cas. 243; *Reg. v. Scaife*, 5 Cox's Crim. Cas. 243; S. C. 17 Law Tim. 152; *Reg. v. Ulmer*, 4 Cox's Crim. Cas. 442).

XI. Trustees—Fraudulent appropriation of trust moneys.—A trustee fraudulently appropriating the trust moneys could not, at common law, be made criminally liable; by 7 & 8 Geo. 4, c. 29, he was rendered liable to punishment if there were a written direction to apply the money, but this not being practically of any utility, the 20 & 21 Vic. c. 54 (*ante*, pp. 154—156), was passed, by s. 1 of which, trustees fraudulently disposing of the trust property are guilty of a misdemeanor.

XII. Bill of exchange on fictitious person—Acceptance.—Where a bill of exchange is drawn, accepted, or indorsed in the name of a fictitious person, this is deemed a forgery, and will support an indictment for forging the bill, acceptance, or indorsement respectively (*R. v. Backler*, 5 C. and P. 118; *R. v. Brannan*, 6 Id. 326; *R. v. Rogers*, 8 Id. 629; see *R. v. Nesbitt*, 6 Cox, C. C. 320).

XIII. Stealing and false pretences.—In order to convict a man on a charge of obtaining money or goods, &c., by false pretences, it must be proved that they were obtained under such circumstances that the prosecutor meant to part with his right to the property in the thing obtained, and not merely with the possession only; if the prosecutor part with the possession only, and not the right of property, the offence is stealing, i. e., larceny, and not an obtaining

of goods by false pretences. In other words, where a right of property passes, the offence is not larceny, but a false pretence (*R. v. Davenport*, A. D. 1826, per Bayley J.; *R. v. Savage*, 6 C. and P. 143; see 7 & 8 Geo. 4, c. 29, s. 53).

XIV. Libel, remedies for.—A party libelled may proceed in a criminal way either by indictment or information against the author of a libel, or he may obtain redress by a civil action for the injury done to himself (4 Bacon's Abr. 458, 5th edit.; Skin. 123, 124; Com. Dig. tit. "Libel," C. 3; 3 Steph. Com. 448, 2nd edit.). The indictment and civil remedy may both be pursued; but not so the criminal information and an action: if the information is granted, the party is not allowed to bring his action; however, if it is refused, an action may be brought (*Wakley v. Cook*, 11 Jur. 377; S. C. 16 Law Journ. N. S. Exch. 225).

XV. Criminal informations.—Criminal informations are either against private individuals or magistrates. as to the former, it extends to *misdemeanors*, but not to treason or felony. Informations are not usually granted for every misdemeanor, but only for gross and notorious misdemeanors, as for libelling or obstructing magistrates in the discharge of their duty, for bribery, riots, batteries, libels, &c., and even for non-repair of a road (11 Jur. 306; 1 Abr. Crim. Cas. 49, 50). So there are many cases of misdemeanors in which the court will refuse a criminal information; as, because the defence does not deserve so severe a proceeding, or the party seeking the information being himself culpable, or because the consequences of such a proceeding would be peculiarly injurious. Informations against magistrates are subject to rules nearly the same as those against private individuals. They are granted for misconduct in discharge of their duties; but it must be shown that they have acted corruptly and illegally. For, where a magistrate appears to have acted with upright intentions, the court will not interfere by information, but will leave the party who thinks himself aggrieved to the more ordinary remedy (2 Burr. 719; 4 Black. Com. 409; Arch. Crim. Plead. and Evid. 71, 8th edit.; 4 Steph. Com. 409, 2nd edit.; 4 Bacon's Abr. 404 *et seq.*, 7th edit.). The application is made to the Court of Queen's Bench. The principal advantage which a client, wishing to proceed for a libel, derives from proceeding by way of criminal information, is, that he can be placed in the witness box, and can deny on oath the truth of the statements in the libel, and can by that method clear his character from the aspersions cast on him.

RESULT OF EXAMINATIONS.

(Hilary Term, 1858.)

As before stated (p. 222), at the examination in Michaelmas Term last there were twenty-four candidates—out of 109—rejected; and we have now to report that at the succeeding examination in the last Hilary Term, out of 98 candidates, no less than *twenty-nine were rejected*. This completely verifies the prediction we ventured to make that the future candidates would not be less fortunate than their predecessors, especially if they went up in the old spirit of “taking their chance.” Of course, some of these were among those rejected in Hilary Term, and their second rejection was doubtless intended as a rebuke to them. It would be better if articulated clerks would look at the matter in a serious light, and not as a mere matter of chance. We had hoped to have been able to furnish the actual answers of a passed candidate, but at the last moment we are disappointed. In fact it is as before stated—namely, that after a clerk has passed, he feels no further interest in the examination, and will not take any, even the slightest, trouble in what cannot be any benefit to himself.

The following is the list of the candidates, being under 26 years of age, whom the examiners considered as deserving of honorary distinction of the first class, namely:—

1. *Matthew Folliott Blakiston*, of St. Leonards, Sussex, aged 22, who served his clerkship to Messrs. Poole and Sons, of Kenilworth, and Messrs. Rickards and Walker, of Lincoln's-inn-fields.
2. *Barnard Platts Broomhead*, of Sheffield, aged 23, who served his clerkship to Mr. Henry Broomhead the elder, of Sheffield, and Mr. Charles Fidley, of Harcourt-buildings, Temple.
3. *Henry Wrigley*, of Oldham, aged 23, who served his clerkship to Mr. Henry Radcliffe, of Oldham, and Mr. George James Murray, of Oldham.
4. *Frederick Hall Roberts*, of Stamford-hill, Middlesex, aged 22, who served his clerkship to Messrs. Cree, Law, and Comyn, of Bush-lane, City.

The Council of the Incorporated Law Society have accordingly awarded the following prizes of books:—To *Mr. Blakiston*, the prize of the Honourable Society of Clifford's-inn; to *Mr. Broomhead*, one of the prizes of the Incorporated Law Society; to *Mr. Wrigley*, one of the prizes of the Incorporated Law Society; and to *Mr. Roberts*, one of the prizes of the Incorporated Law Society.

The examiners have also certified that the following candidates passed examinations nearly equal to those who have been reported for prizes:—

1. *Henry Lawrence Baker*, of Abergavenny, aged 24, who served his clerkship to Mr. Thomas Baker, of Abergavenny, and Messrs Fallows and Son, of Piccadilly, London.
2. *Thomas Wildman Barker*, of Kirkby Lonsdale, aged 24, who served his clerkship to Mr. Thomas Eastham, of Kirkby Lonsdale.
3. *Frederic Thomas Hall*, of 6, Crescent, Camden-road, aged 22, who served his clerkship to Mr. Samuel Denton, of Gray's-inn-square.
4. *Ralph Howard*, of Stockport, aged 24, who served his clerkship to Messrs. Coppock and Oldham, of Stockport.
5. *Henry Edward Mason*, of Louth, aged 22, who served his clerkship to Messrs. Allison, of Louth.
6. *Frederic William Thorowgood*, of Totteridge, Herts, aged 21, who served his clerkship to Messrs. Whatley and Dryland, of Reading, and Messrs. Sudlow, Torr, Janeway, and Tagart, of Bedford-row, London.

By order of the Council,
ROBERT MAUGHAM, Secretary.
Law Society's Hall, 28th Jan., 1858,

The following candidates have been informed by the direction of the examiners, that their answers to the questions were highly satisfactory, and would have entitled them either to a prize or a certificate of merit, in case they had been under the age of twenty-six:—

1. *Charles Bean*, articulated to Mr. Thomas Oldman, of Gainsborough, and Robert Toynbee, of Lincoln.
2. *William Emsley, jun.*, articulated to Mr. Bertie Markland, of Leeds.
3. *Edwin Howard*, articulated to Mr. Leonard Hicks, of Gray's-inn-square.
4. *Archibald Scott Lawson*, articulated to Mr. G. L. P. Eyre, of John-street, Bedford-row.
5. *Richard Henry Peacock*, articulated to Mr. W. H. Trinder, of John-street, Bedford-row.

THE EXAMINATIONS.

Much comment has been made on the unlucky slip in two different sets of questions under the head of “Equity,” in mentioning subpoenas to appear and answer—they having been long since abolished. It certainly affords some show of argument for asking the examiners to be lenient to any candidate who may make a similar *lapsus*. It will also be seen that some of the questions are such as to try the memory to an extraordinary extent, especially those relating to the dates of many acts of Parliament, and the amount of fees payable on the various proceedings in bankruptcy. It shows how much is required from

candidates, and, if the latter were wise, they would exert themselves in earnest to meet the requirements of the examiners.

NOTICES OF NEW BOOKS.

DREWRY'S EQUITY PLEADINGS.

A Concise Treatise on the Principles of Equity Pleading: with Precedents. By C. STEWART DREWRY, Esq., of the Inner Temple, Barrister-at-Law. London: Butterworths.

We find that artied clerks have been warmly disputing the question whether they ought or not to make a portion of their legal curriculum the not very simple matter of common law pleading; and if that branch of learning is thought indispensable, we think equity pleading may put in a similar claim. Indeed, there can be no doubt that pleading, like every other branch of the law, should be studied; but the question is, can this be really done by artied clerks without their neglecting other and more useful matters. If, however, a knowledge of equity pleading be desired by any of our readers, we can refer them to the above work for a very simple and concise outline. Indeed, it may be a question whether the author has not done himself injustice by making his work so very elementary as to render it useless for all but mere students. He states in his preface that a want has been felt among the younger members of the profession and students of a concise exposition of the principles and general rules of equity pleading, and he has accordingly endeavoured to supply this want.

The work contains ten chapters, treating (shortly): Of the parties to a suit; of the modes of instituting a suit in equity; of the defence to suits by demurrer; of pleas; of answers; of amended bills; of revivor and supplement, and of supplemental bills; of interlocutory applications; of the proceedings in going into evidence; and of appeals. There is also an appendix containing precedents of bills, demurrers, pleas, answers, and petitions.

We now give a specimen of the work to enable our readers to form some idea of Mr. Drewry's labours:—

"OF ANSWERS.

"The most usual course of defence to a bill is by answer. An answer may be either voluntary or compulsory. It is voluntary, if no interrogatories being filed by the plaintiff, the defendant nevertheless is advised to put in a counter statement to the bill. It is compulsory, if interrogatories are filed by the plaintiff. As all the rules of pleading which apply to a voluntary answer, apply also to a compulsory answer; and as the latter is in addition regulated also by some special rules, it will be

sufficient to discuss the rules of pleading affecting a compulsory answer.

"The function of an answer is twofold; to give discovery by specific answers to all the questions put by the interrogatories filed in aid of the bill; and to aver all such original matter as the defendant may have to put forward for making a case, which, if true, destroys the equity of the plaintiff's case, even though all or some of the plaintiff's allegations may be true.

"The principal technical requisite of an answer is what is termed *sufficiency*; by which is meant, that it must distinctly answer every interrogatory. It may admit or deny, or it may ignore the facts alleged and interrogated to; or it may state a different state of facts (provided they are relevant to the interrogatory), wholly or partially destroying or qualifying the allegations of the bill; and subject to that statement of facts, the answer may admit, deny, or ignore the matters inquired after; but in one or other of these forms it must meet the interrogatories.

"By way of example: suppose a bill to allege that 'the plaintiff deposited £100 in the hands of B., as his agent, for the purpose of purchasing therewith a cargo of silk.' The interrogatory would be 'whether the plaintiff did not deposit £100, or some other and what sum with B., and whether or not as his agent, or in any other and what character; and whether or not for the purpose of purchasing a cargo of silk, or for some other and what purpose.'

"Now, an answer to that interrogatory would be sufficient if it admitted the whole facts as alleged; or if it denied the whole of them; or if it averred that the defendant was wholly ignorant respecting every one of them; of course in each case repeating or traversing the very words of the interrogatory. So it would be sufficient if it admitted that the plaintiff did place in B.'s hands £100 for the purpose of purchasing a cargo of silk; and then went on to aver circumstances negating agency, and concluded by saying that, 'save as aforesaid,' the defendant denied the placing in the hands of B. the sum of £100, or any other sum, as his agent; or, save as aforesaid, otherwise for the purpose of purchasing a cargo of silk, or for any other purpose.

"So, referring to the most common subject of insufficiency in answers, viz., the answer to the charge of possessing books and papers. The interrogatory usually is of this kind, 'whether the defendant has not in his possession divers or some and what deeds or a deed, maps or a map, letters or a letter, &c., going through a variety of other documents, or other documents or a document.' Now, suppose the defendant has deeds and a letter, but no maps; a sufficient answer would be, 'I have in my possession the deeds and the letter referred

to in the schedule; and, save as aforesaid, I deny that I have in my possession any deeds or a deed, maps or a map (and so on, traversing every word used in the interrogatory), or any documents or document.' But if the answer were 'I have the deeds and the letter referred to in the schedule, but, save as aforesaid, I deny that I have any maps, &c., omitting the general word documents, the answer would be insufficient; because to say that, save in so far as you have deeds, you have not maps, is not an answer whether you have or have not maps; for the word deeds does not necessarily cover or include maps. But a map is a document; and therefore, if you say you have no documents except deeds, you do say that you have no maps.

"These examples will sufficiently make clear, I apprehend, what is meant by a sufficient answer."

"When a bill mixes up, as it often does, in one paragraph, matter which the defendant can partially admit and partially deny, or admit or deny with qualifications, it is very difficult to answer the interrogatory specifically; and then the method of answering above referred to, by first stating the defendant's own account of the transaction, and subject thereto, admitting or denying the whole allegation, is convenient and usually adopted, but it requires care, because, as I have observed, if the matter stated as an original allegation of the answer, does not cover or include the matter inquired after, the traverse of the interrogatory 'save as aforesaid,' is not an answer.

"The penalty for insufficiency in an answer is, that the plaintiff may except to it; that is, submit to the court that the questions are not answered; and if the plaintiff's suggestion is adopted by the court, the defendant then has to pay the costs he has occasioned by the contest, and to put in a further and better answer.

"It must be observed, however, that although the rules as to the sufficiency of an answer are exactly the same as they were before the 15 & 16 Vic. c. 86, the temper of the judges in dealing with them is very different; and the effect of certain powers given by that statute renders excepting to answers in most cases useless; consequently counsel of experience never except to answers upon merely technical insufficiency, and only do so in very exceptional cases of substantial insufficiency. Before the statute referred to, a defendant could not be examined orally at all, nor, before the cause was at issue, even upon interrogatories; nor could any production of papers be obtained from him except upon the admissions in his answers. But the statute has made some important alterations in practice. One is, that a plaintiff may now either cross-examine the defendant on his answer, treating it as an affidavit, or may examine

him in chief. And it is obvious that a defendant, inclined to fence with the truth, can be much more readily compelled by oral examination to state the truth than he can upon written interrogatories, the answers to which, after he has settled them at leisure, are ultimately framed with all the skill of experienced and astute counsel. When, therefore, a defendant evades a question of substance, it is in general more advantageous, more expeditious, and less costly to the suitor to examine the defendant orally, than to except to his answer and obtain a further answer.

"With regard to exceptions on merely technical insufficiency, when the defendant has substantially answered, it is sufficient to say that the judges view them with great distaste and displeasure, as an abuse of the pleadings of the court, and that counsel of experience never take them."

On the whole, it appears to us that, keeping in view Mr. Drewry's design—namely, to produce a work on equity pleading for the information of students—he has successfully accomplished his proposed object; and we have no doubt that a reader of ordinary intelligence may make himself completely master of the whole work in a very short space of time, and will thereby gain a good general notion of equity pleading, which is all we believe that the generality of articulated clerks care about.

BILLS OF EXCHANGE SUMMARY PROCEEDINGS ACT.

Regula Generalis—Hilary Term, 1858.—Whereas, by the rule of Michaelmas Term, 1855, with respect to indorsements on writs issued under the Bills of Exchange Act, 1855, it was, amongst other things, ordered, "that no other claim than a claim on a bill of exchange or promissory note should be included in writs under the Summary Procedure on Bills of Exchange Act, 1855:"

And whereas it is expedient that the said rule should be explained and amended:

It is hereby ordered, that where a defendant obtains leave to appear according to the said act, and enters appearance to any such writ, according to the said rule of Michaelmas Term, 1855, the plaintiff may include in his declaration, together with a count on the bill of exchange or promissory note (as the case may be) a count upon the consideration, if any, between the plaintiff and defendant, for the bill of exchange or promissory note, and deliver a particular of demand accordingly.

Alien—Devise to trustees, in trust for an alien, will (per M. R.) be enforced for the benefit of the Crown, and Rittson v. Stordy, 1 Jur. N. S. 771, not followed (Barrow v. Wadkin, 3 Jur. N. S. 679).

COURSES OF LAW STUDIES.

(Continued from p. 259).

Of the distinction between local and transitory actions—Privy of contract and of estate.—It seems to be rather an indistinct criterion of the locality to refer it as Blackstone (3 Com. 294) does to the "plaintiff's suing for damages, &c., affecting land." For, if the lessor brings an action of debt for rent, or repairs, &c., against the lessee, or the assignee of the lessee, he equally sues for damages, &c., affecting land, and yet they are not equally local actions. The distinction between transitory and local actions, is founded on the distinction which the law takes between *privy of contract*, which is personal, and therefore transitory, and *privy of estate*, which is not personal, but local. Thus, if an action of debt or covenant for rent, or repairs, &c., is brought by the lessor against the lessee, this is a transitory action, and may be brought in any county; but, if brought by the lessor against the assignee of the lessee, the action is then local, and must be brought in the county in which the land lies, and in no other. Why? Because between the lessor and the lessee there is *privy of contract*, which is always of a transitory nature. *Debita et contracta sunt nullius loci*. But, if the lessee assigns the term, and afterwards the lessor brings an action of debt for the rent arrear, against the assignee, the action is then brought in respect of the land, upon the *privy of estate* alone, and not of contract. For the *privy of contract*, which subsisted between the lessor and the lessee, was destroyed by the assignment. And so it is where the assignee of the reversion brings the action against the lessee, or the assignee of the lessee, for the same reason. For the statute 32 Hen. 8, only transfers the same *privy* to the assignee of the reversion, which the lessor himself had or might have had; and which, after assignment, is therefore *privy of estate* alone, and not of contract. And so, again, on the other hand, if an action of covenant is brought by the lessee against the lessor, it is founded in the personal *privy* between the parties, and is therefore transitory; but if brought by the assignee of the lessee, or against the assignee of the reversion, the *privy of contract* being determined by the assignment, the action is founded in the *privy of estate* alone, and is consequently local; and yet, in both cases, the plaintiff sues for damages, &c., affecting land.

Heriots and heriot-service.—Again, in treating of the recovery of heriots, Blackstone says, "As for that division of heriots, which is called heriot-service, and is only a species of rent, the lord may distrain for this as well as seise" (3 Com. 15). Now the heriot-service which is reserved by deed, is only a

species of rent, and, therefore, the law allows it to be recovered as such, by the usual remedies of distress, or action of debt, or covenant; but it does not follow, that it may be also seised as a heriot which is due by custom. On the contrary, the heriot-service, which may be either seised or distrained for, at the lord's discretion, is that which is due by ancient tenure (having been created before the statute of *quia emptores*), and not that which is due, like rent, upon a reservation in a grant or lease, &c. The distinction, in few words, is this: the heriot-service which is due by deed, and which is only a species of rent, lies in *rendre* alone; heriot-custom in *prendre* alone; and heriot-service, which is due "by tenure," in both *rendre* and *prendre* (see 2 Saunders, part 1, c. 59; First Book, 202).

Fee-farm rent.—Quære again, whether, in its present acceptation, the meaning of a "fee-farm rent," is not rather to be referred to the *perpetuity* of the rent than to the *quantum* (2 Comm. 48, and see the etymology of "farm," v. 2, p. 318). For is not every rent or service, whatever the *quantum* may be, which has been reserved upon a grant in fee, a fee-farm rent (see the note 235 to Co. Litt. 144 a).

Rent, &c., pur autre vie.—Quære again, if a rent, or other incorporeal hereditament, is granted *pur autre vie*, and the grantee dies in the lifetime of the *cestui que vie*, whether such rent, or the like, will be thereupon determined, as Blackstone apprehends (2 Comm. 260); or whether, on the contrary, since the statutes 29 Car. 2, c. 3, and 14 Geo. 2, c. 20, it will not be held to continue in the grantee's representatives (see 3 P. Williams, 264, in the note; Barnardist. Rep. in Ch. 46; Kendal v. Miesfield). Since Blackstone's time, it was decided, that when the grantee of a rent-charge *pur autre vie* dies during the life of the *cestui que vie*, it will go to his executors, although executors are not named in the grant (Bearpark v. Hutchinson, 7 Bing. 178; Tudor's R. P. 33; Burt. Comp. pl. 730, 1127; Doe v. Lewis, 9 M. and W. 662).

Prescription for what cannot be raised by grant.—Again, in treating of title by prescription, Blackstone says, "A prescription cannot be for a thing that cannot be raised by grant—as for a toll, for example: for as such claim could never have been good by any grant, it shall not be good by prescription (2 Com. 265). It is generally true; first, that every prescription presupposes a grant to have existed; however, it is to be remarked that the doctrine, that prescription presupposes a grant, is not to be understood in a literal sense, but only as a presumption of law; in the same manner as it is said *non user* presupposes a release. It is not, that the courts always really believe that such grant, or such release, were ever actually executed; but, for the sake of the

general principle of quieting the possession, they will not permit it to be disturbed by claims long dormant, and, therefore, determine in the same manner as they would determine if the very instrument of grant or release were produced; and, secondly, that a toll upon the public, *per se*, could never have been good by any grant; but it does not follow that it might not have been raised upon some other consideration, which may operate in lieu of a grant, and, consequently, *may be claimed by prescription* (1 T. Rep. 660; and see Co. Litt. 114 b, where a toll is expressly mentioned among those things that *may be claimed by prescription*; also, Burton, pl. 1037, as annexed to a fair or market; First Book, pp. 11, 161). Thus, where the soil and the toll have been in the same hands, from before time of memory, it will be presumed that the soil was originally granted to the public in consideration of the toll; and, in that case, the original grant will be held to be a good consideration to support the demand. And so it is in the case of prescription for exclusive common of pasture, for the same reason. The law will not suppose, that, at the original grant of the common, the lord meant to exclude himself (Co. Litt. 122 b); and yet, the freeholders by prescription, and the copyholders by custom (which in this instance is equivalent to and in lieu of prescription), may have sole and separate pasture against the lord; for, where such exclusive common has immemorially subsisted, it will be presumed that the lord had originally granted away the seignior to the freeholders, and afterwards resumed it again, by their regrant, divested of the commonage (Saunders, 1, 59; Ibid. 2, 5).

Several fishery.—By the same rule, again, the ownership of the soil does not appear to be essential (as Blackstone states it) to a several fishery (2 Com. 39); for there is no inconsistency in supposing the sole right of fishery to have been originally granted with a reservation of the soil; and, consequently, a man may prescribe for a several fishery, against the owner of the soil, upon the same principle that sole and separate pasture may be prescribed for against the lord; indeed, Lord Coke distinctly tells us, they may be in different persons (Co. Litt. 4 b, and 122 a). And, secondly, it may also be doubted whether Blackstone is quite accurate in defining a free fishery, to be the exclusive right of fishing in a public river (2 Com. 39); for whether the franchise or liberty to fish be exclusive or not, and whether the stream be private or public, it seems to be equally, in the language of the law, a free fishery (see the authorities cited in the note 181 to Co. Litt. 122 a; also Holford v. Bailey, 13 Jur. 278; First Book, 143).

Sovereign's right to game—Ownership of wild

animals.—Again, it is contended that the sole and exclusive property of those animals that come under the denomination of game has been originally vested in the king, upon the common-law maxim of their being *bona vacantia*, and having no other owner (2 Com. 415). Mr. Christian, in his notes on B. C. has entered largely into the refutation of this doctrine. My reason for introducing it is, therefore, only to show how it stands contradicted by Blackstone's own admissions; First Book, 201; 1 L. C. 343, 344; 2 Id. 230). But how does this stand with the admission that every man had, originally, a qualified ownership in all animals *feræ naturæ*, as a necessary consequence of possession, *ratione soli*? For, originally, there was no distinction between one species of wild animals and another. Or how comes it that the common law should have, originally, overlooked this qualified ownership in hares and partridges, any more than in squirrels and butterflies? For these are all animals *feræ naturæ* alike, and the notion of their being *bona vacantia* cannot apply to one species more than to another. With respect to waifs and estrays, and the like, these indeed are *bona vacantia*, for they are things out of possession, and in which *no man claims any property*; and, therefore, the law has attached them to the royal prerogative, upon a principle of general policy, for the sake of avoiding the contention of occupancy, and to prevent temptations to committing theft. But, in the present instance, there originally existed a qualified ownership, *ratione soli*: and the supervenient restraints imposed on the exercise of that qualified ownership have merely arisen from positive laws since made, and subject to the restrictions of which the original qualified ownership still exists (2 Com. 403); and I, therefore, apprehend the conclusion to be, that this species of property was attached to the royal prerogative in restriction and infringement of the common right, and not as *bona vacantia*, or things in which no man claimed a property.

Sheriff acting as returning officer of members of Parliament—Judicial and ministerial duties.—Again, in distinguishing between the judicial and ministerial capacities of sheriff, Blackstone considers it to be in the former of these capacities, and not in the latter, that he (the sheriff) is to decide the election of knights of the shire, and to return such as he shall determine to be duly elected (2 Com. 403; and see contra, Blackstone's Answer to Sir William Meredith's Pamphlet, 1769, p. 23). Now, if a magistrate or other public officer, in the discharge of a ministerial duty, mistakes the law, he renders himself personally responsible for all the consequences, and is liable to an action in which damages shall be recovered at the suit of the party aggrieved; but

otherwise it is if he mistakes the law in a thing within his jurisdiction, acting as judge and not as minister (1 Hawk. P. C. 192; 2 Ibid. 4 and 85). For example, if my servant is robbed, and a justice refuses to examine him concerning the robbery, by which I am prevented from proceeding against the hundred, I may have an action on the case against him. Why? Because the examination by him in this case is not as judge, but as a particular minister appointed by the act for that purpose (1 Leon. 323). Upon the same principle, if justices of the peace adjudge a child to be a bastard who is not so, an action lies against them. For here, again, they are acting in the discharge of a ministerial function, and not as judges (Comberb. 482; *sed qu.* now). The escheator who returns a false office, contrary to what was found by the jury, is liable to an action upon the case at the suit of the party aggrieved, upon the same principle (4 Inst. 226; 1 Roll. Abridgm. 92). And why then is a different conclusion to be drawn with respect to the sheriff acting as the returning officer at the election of knights of the shire? Does he not subject himself to an action by his false return, in the same manner as the escheator does? And why, but because in the eye of the law he is considered like the escheator, to be acting in that capacity, not as judge, but as minister? And if he fails in the performance of his duty, by not making the return in due time, or by returning others than those who are duly elected, he is not only liable to an action in which double damages are given, but incurs a heavy penalty (1 Com. 180; 2 Will. 4, c. 45, s. 76; 6 Vic. c. 18, s. 7; Shaw's Elect. 75). Since Blackstone's time, the question as to whether the sheriff, acting as a returning officer, was discharging a judicial or ministerial office has been discussed: Lord Tenterden thought he filled a mixed character, partly judicial, partly ministerial (Cullen v. Morris, 2 Stark. N. P. C. 577). Several statutes have stripped the sheriff of judicial functions at parliamentary elections (Shaw's Elect. 75).

Actions for slander and libel—Truth—Damnum absque injuria.—Again, we read, that "no action will lie for slander or libel where the defendant can prove the facts to be true. As, if I can prove the tradesman a bankrupt, the physician a quack, the lawyer a knave, and the divine a heretic, this will destroy their respective actions. For though there may be damage sufficient accruing from it, yet if the fact be true, it is *damnum absque injuria*, and where there is no injury, the law gives no remedy. *Eum qui nocentem infamat, non est æquum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit* (8 Bl. Com. 125, 306; 4 Id. 125). That the truth of a libel may be pleaded specially, in justification, is said to be warranted by the opinion

of the profession, and the practice of the present day; but this is to be understood with certain restrictions; and the defendant cannot, upon the general issue of "not guilty," prove the facts to be true in *justification*, but only in *mitigation of the damages* (Selwyn's Law of Nisi Prius, p. 935; Buller, N. P. p. 9). On a motion for an information in the Court of King's Bench, for a libel (Mich. Term, 8 Geo. 2), Lord Chief Justice Hardwicke expressly declared that it was a mistake to suppose that if an action were brought, the fact, if true, might be justified; that he had never heard of a justification in an action for a libel even hinted at; that the law was too careful in discountenancing such practices; and that the only favour which the truth afforded in such case was, that it might be shown in *mitigation of damages in an action*, and of the fine upon an indictment or information. [A MS. remark on this in our copy, runs thus: "There does not appear to be any express decision to this effect, though it has latterly grown into practice, and seems now to be admitted; yet if the subject be duly considered, the policy of the rule may, perhaps, appear very questionable; we must be careful not to confound the principles of *slander* and *libel*. The writer reasons very ably on the subject below."] I presume then, with submission, that the law is much too generally stated, when it is said, that *no action* will lie if the defendant can prove the facts to be true; but that which I principally object to, in the present instance, is the general tenor of the reasoning from the dictum of the civil law. *Eum qui nocentem infamat, &c.*, is one of those loose dicta of the civilians, in which there is neither justice nor policy, and which has accordingly been rejected by our neighbours of the Continent, as may be seen by the following extract from the Introduction to their new Penal Code:—"Depuis longtemps on desirait que le législateur mit un frein à de tels excès; car ou le fait qu'on s'est permis d'imputer à quelqu'un est défendu par la loi, ou il ne l'est pas. S'il est défendu, c'est aux juges qu'il appartient de vérifier le fait et d'appliquer la peine. Tout bon citoyen doit le dénoncer, et si au lieu de le déclarer à la justice, il le répand dans le public, soit par ses propos, soit par ses écrits, il est évident que cette conduite est dirigée par la méchanceté plutôt que par l'amour du bien. La malignité qui saisit avidement ce qu'on lui présente comme ridicule ou odieux, convertit bientôt les allegations en preuves, et bientôt le poison de la calomnie a fait des ravages qui souvent ne s'arrêtent pas à la personne calomniée, mais portent la désolation dans toute la famille. En vain prétendraient-ils que les faits sont notoires; en vain demanderaient-ils qu'on les admette à la preuve; ils ne seraient point écoutés; de pareils débats ne

serviraient qu'à donner plus d'éclat à cette publicité même qui constitue le délit (Code Penal, liv. 8, tit. 2, ch. 1). It is true, that where there is damage without injury, *ubi damnum absque injuriâ*, the law gives no remedy. But then it is to be understood that the act, from which the damage arises, is itself perfectly innocent and lawful. For example, suppose I have a mill, and my neighbour builds a mill upon his own ground, by which the profit of my mill is diminished, yet no action lies against him; for, in building the mill upon his own ground, he does a lawful act (1 Roll. Abridg. 107; Noy's Maxims, 84). And so if one set up a school in the neighbourhood of an ancient school, by which the ancient school receives damage, yet no action lies; for this is a lawful act, and the public are benefitted by the competition in such cases (1 Roll. Abridgm. 107; Noy's Maxims, 84). But, with respect to defamation of character, which is the ground of an action upon the case, for slander or libel, the conclusion is widely different; for, in order to support the action, the defamation must be shown to be *from malice*, and unconnected with the ends of public justice, and, consequently, in no point of view can be said to be an innocent and lawful act (1 Lev. 82; 1 Roll. Abridgm. 58; Finch L. 186). On the contrary, the very essence of this offence is the *malus animus*, the malicious and wicked intention to defame and vilify, which is no more capable of being justified by the eventual truth of the suggestion, upon the general issue of "not guilty," than the act of wilfully and maliciously killing an attainted or outlawed felon or traitor, is to be justified by the production of the record of his attainder or outlawry (1 Hale. P. C. 497). But although it is strictly *no justification* of the defamer, that the alleged matter is true, yet the law having, in this particular, a respect to the weaknesses and frailties of human nature, allows him either to *plead specially some traversable fact*, which, by disproving the *falsity* of the accusation, is tantamount to a *justification* (and that indeed has only been settled by very late decisions), or to give evidence to that effect upon the general issue, not in justification, but in mitigation of the damages to be rendered by way of compensation to the party aggrieved; for it is evident that this must always depend in a great measure upon the relative innocence and credit of him to whom the compensation is to be made. And though, as a general proposition, it is no doubt expedient that offences should be made known, it is not so by means of slander and libel; not by defamatory accusations promulgated in malice, and unconnected with the ends of public justice. *If a person has been guilty of a crime, he ought to be proceeded against in a legal way, and not reflected upon in this manner* (Buller, N. P. 9). In

Selw. N. P. 1052, 11th edit., it is said that if the matter of the libel be true, the defendant may plead it in justification; but in such justification if there be anything specific in the subject, issuable facts ought to be stated, and not general charges of misconduct. So speaking of slander, it is said (p. 1266), if the charge be true, the defendant may plead it in justification (see 1 L. C. 336; First Book, 242).

"His faults lie open to the lawn, let those,
Not you, correct them!"

Civil law maxims.—And here, perhaps, I may be allowed to remark, that the maxims borrowed from the Roman or civil law are sometimes very unnecessarily introduced in Blackstone's Commentaries, when the suggestions of plain common sense may serve our purpose a great deal better. Of this description, the foregoing is a remarkable example. Upon another occasion, instead of explaining that the inn-keeper is bound to restitution, if the guest is robbed in his house, by any person whatever, unless by his own servant or companion, because of the public employment he exercises (1 Ld. Raym. 917; 1 Salk. 143; 12 Mod. 487), he refers us to the vague maxim of *qui non prohibet cum prohibere possit, judet*. And instead of explaining, that the husband and wife were not formerly, even in civil proceedings (see First Book, 274), admitted to be witnesses for each other, because it might be a temptation to perjury, nor against each other, because it would be against the policy of marriage, he assigns the more remote reasons, concluded, in the first instance, from the maxim, *nemo in propria causa testis esse debet*; and in the second, from the maxim, *nemo tenetur seipsum accusare* (see 1 L. C. 267).

VENDORS AND PURCHASERS.

PURCHASE FOR VALUABLE CONSIDERATION WITHOUT NOTICE.—*Legal estate obtained from a trustee—Mistake—Forfeiture—Estoppel.*—In the notorious case of *Faussett v. Carpenter* (2 Dow. and Cl. 232), it is generally agreed that the House of Lords came to a wrong decision, which at one time it was intended to remedy by an act of Parliament, though this was never done. The question was, as to the legal effect of a conveyance in which the parties were thus situated: one party, P., happened to be, under a settlement, a trustee for one of the parties to the conveyance, N. He also, in right of his wife, had himself a beneficial interest in one-third, and a sale was made of all the three parts to a purchaser, all the parties conveying, N. and P. conveying at the same time; and the House of Lords held that the effect of the deed was not to pass in law the interest which

P. held as trustee under N.'s settlement—a position clearly erroneous, as pointed out in the following decision of Vice-Chancellor Wood, where his Honour held that the doctrine of estoppel by deed only applies between the parties to the deed, and to matters arising out of the deed. In collateral matters, the deed would be evidence, but no estoppel. A purchaser for valuable consideration, without notice, getting in the legal estate from a trustee, takes it subject to all those trusts upon which the trustee held it, and appearing upon the face of the instrument under which the trustee takes. It appeared that a testator gave all his real estates to three trustees, of whom his brother J. C. was one, upon trust, amongst other things, to pay to each of his brothers the annual value of £100 during his life, or until he should take the benefit of any act for the relief of insolvent debtors, or become bankrupt or do any act which, but for that condition, would have the effect of giving the benefit of his annuity to any other person; and in the event of either of such last-mentioned events happening, then his annuity should from thenceforth cease; and upon trust, after paying certain other annuities, for the benefit of the testator's sisters, to pay the whole of the surplus rents and profits to J. C. for his life, with remainders in trust for the children of J. C.; and in default of such issue, upon trust to pay the same unto and equally between such of the testator's brothers and sisters as might be then living, and the survivors and survivor of them, during their respective lives, but subject to the same restrictions respecting bankruptcy and insolvency, and against alienation as thereinbefore contained with reference to the annuities. This will, not having been discovered for several years after the death of the testator, another will was acted on in the meantime, whereby the testator had given all his real estates equally amongst his brothers and sisters; and acting on the belief that this was the last will, J. C. joined some of his brothers in mortgaging all their interest in the testator's estate: Held, first, that the whole interest given by the last will passed by the mortgage; and secondly, that the annuities given by the will to such as joined in the mortgage, ceased upon the execution of the mortgage. *Carter v. Carter*, 27 Law Journ. Ch. 74.

ASSIGNEES PURCHASING DIVIDENDS.

—*Creditor and assignee—Solicitor purchasing—Trustee and cestui que trust—Sale of dividend.*—A purchase by an assignee under a bankruptcy of a creditor's dividends under a proof is valid as between the assignee and that creditor, supposing that the transaction is fair, that the creditor is *sui juris*, and that there is no undue exercise of power or influence on the part of the assignee. Where an assignee pur-

chases a creditor's dividends, conjointly with another person whose position is known to the creditor, although by reason of concealment of the facts that the assignee is purchasing for his own benefit, the transaction is not valid as to the assignee: it is valid as between the creditor and such other person. *Semble*, a trustee merely as such may purchase of his cestui que trust, a solicitor of his client, or an assignee of a creditor, supposing that the transaction is fair, and that there is no superior means of knowledge of which the cestui que trust is not aware (*Pooley v. Quilter*, 6 Week. Rep. 216). As this is a very important matter we will give such part of the judgment of Vice-Chancellor Kindersley, as will explain the decision, premising that the plaintiff was a creditor entitled to dividends under a bankrupt's estate, and the defendant was one of the creditor's assignees. His Honour said that it was clear that Quilter (the defendant) was made aware of the plaintiff's desire to sell, being in want of ready money, and that he wrote to Quilter saying that he was ready to sell, not to Quilter specially, but that he was ready to sell generally. Whidborne was the solicitor of Hennet before the bankruptcy, and therefore had knowledge more or less of his affairs; but he was not employed on the commission. It did not appear that it was communicated to the plaintiff at first who was buying, but Whidborne became the purchaser. There was then the negotiation by Mackenzie for Whidborne; and it now appeared that as to a moiety, Whidborne was purchasing on behalf of Quilter, one of the assignees—that was beyond all doubt with respect to the first transaction; and in respect of the moiety purchased by Whidborne, one-third was for the benefit of Brunsell, who had no interest in the subsequent sales. The first question was, what were the grounds upon which the plaintiff sought to impeach the transaction? It was very clear that a person in the situation of an assignee had a greater means of knowledge of matters relating to the bankrupt's estate than a mere creditor, unless there were special circumstances; and it must be well known to every creditor, and every one else, that he had such means of knowledge. First, as to the amount of the assets, as to their nature, what they might realise, and what debts due from other persons might produce, and as to the probability of the amount of debts to be established on the whole against the estate. There were also superior means of forming a judgment as to the time which must elapse before the assets were realised. He must know the value of any given creditor's claim; and it was therefore justly said that when the plaintiff was dealing with Quilter, he was dealing with a person having better means of knowledge than himself. On the other

hand, it was obvious that Pooley, who was not weak in intellect or incapacitated, but a man of business, must have known that Quilter had such means of knowledge. There was no fixed rule that a person might not purchase from his cestui que trust—some additional ingredient must be introduced. A trustee for sale could not purchase so long as such relation continued; nor could a trustee who had by means of his office superior knowledge as to value, deal with his cestui que trust who had not such means, and who did not know that the trustee had them. The mere naked proposition, however, could not be enunciated as the rule of the court. There might be trustees in various positions—as, for instance, trustees to preserve contingent remainders, or where there was an estate in A. in fee in trust for B. in fee, B. being adult, and *sui juris*, where the proposition would not hold good; or, to go further, the case of a solicitor who was not absolutely precluded from purchasing from his client, merely because he was a solicitor, although no doubt he filled a sort of fiduciary character. At the same time the court looked with great jealousy to see that all was fair. Perhaps the strongest case was that of an assignee, because there was scarcely a case where a trustee (for he was such) had greater means in dealing with creditors of availing himself of his position. But still even there, where the party dealing was adult and there was no undue influence, there was no reason why a creditor might not deal with an assignee, or why an assignee should be disqualified from dealing with a creditor. Another question was, whether the assignee might purchase for himself? Let it be assumed that there was a direct dealing with Quilter, there was no rule entitling the plaintiff to say, "Although I knew whom I was dealing with" (alleging no concealment or undue influence) "the sale must be set aside," merely because it was the case of creditor and assignee. There was here no suggestion of misrepresentation by Quilter, nor of concealment intentional or unintentional of any fact which he ought to have communicated to the plaintiff. It was said, he knew there would be an early dividend, but that did not appear, nor that there was any undue exercise of the power of the assignee or inadequacy of purchase money. It was true the money paid was 6s. and not 8s. in the pound, but the fact of the probability of the dividend exceeding 8s. was known to both parties, and indeed it was recited in the assignment—the £7,000 was given for that chance. There were no extrinsic circumstances of undue influence, or exercise of the power of the assignee, or inadequacy of price, to induce the court to say that the transaction ought not to stand. Therefore if there had been a direct assignment from the plaintiff to Quilter, he (the

Vice-Chancellor), much as he disapproved of such a transaction on the part of an assignee, would be under the necessity of saying that the plaintiff at least was not the person who had a right to impeach it, being adult and *sui juris*, and there being no extrinsic circumstances. The most important point, however, was, suppose Pooley conceived he was dealing with Whidborne, and then after the transaction was completed in 1856, discovered that he was dealing with him as agent and trustee for Quilter, that would give the matter a very different aspect. If the court should conclude that Pooley was not aware till after the transaction was completed that Quilter was beneficially interested in the purchase made by Whidborne, at least to the extent of the interest of Quilter, he could not maintain that as against Pooley, and if so, an assignee of general creditors would have no such right. How did the matter stand on that point? Quilter represented that he never told Pooley that he was interested. There was nothing on the face of the transactions to show that any one but Whidborne was interested. Quilter said that the plaintiff had in the course of the interviews that took place offered to sell to him. It was very remarkable that no one mentioned the circumstance to Pooley. Taylor in his letter did not say that the plaintiff did not know it; and although inferences might be drawn from those circumstances, it was not inconsistent with the probability that the plaintiff did not know the fact that Quilter was interested in the purchase. Then there was the unequivocal oath of Pooley, that until some time in 1856 he was not aware that Quilter was interested. Upon the evidence as it stood, therefore, he (the Vice-Chancellor) should not decide the point. The affidavits were made at the last moment, and every one who could give evidence was living. The fact might be got at in three ways: by an inquiry in chambers, in which case the parties could be cross-examined upon their affidavits, by *visd voce* examination in court under the new practice, and by directing an issue; in which case there would not only be examination and cross-examination personally, but the matter would be decided by that tribunal which was considered the very best to judge of the truth in such a case. With respect to the case of *Whidborne*, there was no doubt that the plaintiff knew the fact of his being the solicitor of the bankrupt previously to the bankruptcy. Therefore, as between Pooley and Whidborne, there was no question but that the plaintiff would have no relief as against him. But if the transaction with Quilter ought not to stand, the question was whether the plaintiff was entitled to set aside the transaction as to Whidborne; it appeared to his Honour he was not. The same observation applied to the case of *Brunakell*. The

bill therefore must be dismissed with costs against Brunsell's executors, and also against Whidborne; but supposing the plaintiff succeeded ultimately against Quilter, the costs, relating to that portion as to which Whidborne was a trustee for Quilter, would be paid by the plaintiff, reserving the question whether the plaintiff would be entitled to recover them back from Quilter.

SALE OR MORTGAGE.—*Right of re-purchase or redemption—Statute of Limitations.*—An absolute conveyance containing no recital of a contract for a loan does not, *prima facie*, become a mortgage merely because the vendor stipulates for a right to repurchase. Therefore, where in consideration of a certain sum, N. conveyed and assigned freeholds and leaseholds to C. absolutely, who by another indenture of even date, covenanted that in case N. should be desirous to repurchase, and should give notice, &c., and should pay the said sum, C., his heirs, &c., would execute a conveyance, it was held (reversing the decision of Stuart, V. C.), that this was a sale, not a mortgage. *Quære*, C. having been in possession for twenty-five years of the rents and profits, is the case within the 28th section of 3 & 4 Will. 4, c. 27. *Alderson v. White*, 6 Week. Rep. 243.

SUMMARY OF DECISIONS.

CONVEYANCING AND EQUITY.

ABORTIVE COMPANY.—*Bill for accounts—Lapse of time—Acquiescence—Parties—Barratry.*—The following decision is one of great importance as to the effect of the abandonment of a scheme for an intended company and the return of part of the deposits of the shareholders without any specific accounts showing the appropriation of the monies of the shareholders. Also as to what is termed barratry on the part of solicitors. The plaintiffs were two shareholders of fifty shares each (on which deposits of £3 12s. 6d. were paid) in a projected railway company which failed to pass their bill through Parliament in the session of 1846, and was abandoned. The plaintiffs filed this bill in 1853, on behalf of themselves and all other shareholders except the defendants who were the provisional committee for an account. A suit for a similar object and instituted by other shareholders, was compromised in 1851. The same solicitors acted for the plaintiffs in the present and former suit: Held, that the managing committee of a projected railway are not merely agents of the company, but trustees; but, though time is not a bar to a suit for an account, yet it will form a material ingredient in the question: but held, that under the circumstances of this case the lapse of

time since the abandonment of the scheme and acquiescence of the parties during that period and the institution of the former suit, were not a bar to the prosecution of this suit: Held, that to constitute barratry, the instigation of the client to institute the suit is not sufficient; the suit must be substantially the suit of a solicitor on which the client can neither gain nor lose. The shares of a projected railway company were not taken up in sufficient numbers to enable the deposit of one-third of the whole of the proposed capital to be made in accordance with the rules of the House of Lords and to prevent the abandonment of the scheme the provisional committee announced to the shareholders that the requisite number would be taken up by eleven members of the committee and three other persons, and on the faith of this statement the shareholders resolved to proceed with the bill; the additional shares were taken up and the deposit was paid in accordance with the rules of the house. The bill was however thrown out in the House of Lords and the scheme was abandoned. It appeared that the sum necessary for payment of the deposit of £2 12s. 6d. on the additional shares had been borrowed from the bankers of the company, and after the abandonment of the scheme the committee out of the funds in their hands repaid the amount of the deposits paid on the additional shares. They subsequently repaid 10s. per share on the original shares to those shareholders who would receive it, but they rendered no account of their receipts and payments to the shareholders. One of the plaintiffs received the 10s. per share but the other did not. The bill was filed on behalf of all the shareholders except the defendants for an account and consequential relief. The three shareholders not members of the committee who took some of the additional shares were not made defendants: Held, that there was a misjoinder of parties in not making the three shareholders defendants, as they could not properly be plaintiffs inasmuch as an account was sought against them in respect of the repayment of the deposits on the additional shares in full, but the cause was ordered to stand over with liberty to the plaintiffs to amend by making them defendants: also that there was no misjoinder of plaintiffs because one of the plaintiffs had accepted the 10s. per share: Held, that the suit was not defective by reason of the dismissal of the suit against two of the committee who had not acted. A decree was made against those members of the committee who sanctioned the repayment of the deposit on the additional shares but the bill was dismissed against such of the defendants as were not members of the committee when the repayment of the deposit on the additional shares in full was made, and with costs to be paid by

the plaintiffs although they had been added after the coming in of the answer of the other defendants by which they had insisted that they were necessary parties. *Williams v. Page*, 30 Law Tim. Rep. 360.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—*Insolvency of assignor*—*Creditor not entitled to come in subsequently*.—In the case of deeds for the benefit of creditors, it is generally stated that it is executed for the benefit of such creditors as shall execute it. In such cases the only question is up to what time are the creditors entitled to come in under the deed. The principle respecting this is laid down by Lord St. Leonards in *Field v. Lord Donoughmore* (1 Dru. and W. 227), in which he states that "it is not absolutely necessary that the creditor should execute the deed if he has assented to it. If he has acquiesced in it, or acted under its provisions, and complied with its terms, and the other side has expressed no dissatisfaction, the settled law of the Court is, that he is entitled to its benefits." The creditor must, however, do some act which amounts to acquiescence; it is not sufficient for him merely to stand by and take no part at all in the matter. It is true, in some cases, as in the case of *Nicholson v. Tutin* (2 Kay and J. 18), something may be inferred from his standing by until he has lost a remedy which he might have had at law if he had not come in under the deed. The expression used in some of the cases, that it is not necessary for the creditor irrevocably to bind himself, does not mean anything more than this, that he need not irrevocably bind himself at law. But it is impossible that a court of equity can allow a creditor to stand by, and play fast and loose, and to say, I will take under the deed if it is for my advantage, and against the deed, if I find that more profitable. There can be no doubt that so long as the creditors have done no act inconsistent with the deed, they may come in under it, provided the relation between them remains unchanged. But after the insolvency of a debtor who has executed an assignment for the benefit of his creditors, who should come in under the deed, creditors who have not previously assented to the deed, but have lain by, are precluded from taking any benefit under it. *Biron v. Mount*, 30 Law Tim. Rep. 344.

CHOSE IN ACTION.—*Stop-order*—*Trustee Relief Act*—*Notice*.—Where the assignee of a reversionary interest in a trustee fund gives notice of his assignment to the trustee, and the trustee afterwards pays the fund into court under the Trustee Relief Act, setting out in his affidavit the notice so given to him, the assignee should also obtain a stop-order. *Re Miller*, 6 Week. Rep. 238.

COPYHOLDS.—*Admission for three lives*—*Custom as to rights of cestui que vies*—*Advancement to sons*

named in grant—*Devises having legal title sent to law*.—A custom was alleged in a manor, that where a person is admitted for the lives of three other persons, the cestui que vies would successively be entitled to admission for life after his death, notwithstanding a devise by him: *Quære*, whether such a custom would be good. A. was admitted tenant to copyholds, to hold to him (without words of inheritance) for the lives of B., C., and D., his three sons: Held, assuming that a valid custom existed in the manor, that the whole beneficial interest was in A., and that he could pass it by devise: Held, that the fact of his having named his three sons as the cestui que vies amounted to an advancement for the sons, and that they were entitled to the property successively for life against the devisees of the father. A bill filed by the devisee of A. against the surviving son of A., who had been admitted as tenant, to obtain a declaration that he was trustee for the plaintiff, dismissed on the ground that, if he was entitled to the property under the devise, his remedy was at law. *Jeans v. Cooke*, 30 Law Tim. Rep. 253.

COPYRIGHT.—*Piracy*—*Legitimate use of preceding works*.—The compiler of a dictionary or works in which absolute originality is of necessity excluded, is entitled without exposing himself to a charge of piracy, to make use of preceding works upon the subject where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction as to produce an original result, provided that he does not deny the use made of such preceding works, and the alterations are not merely colourably made. Various tests as to what constitutes the legitimate use of preceding works. *Spiers v. Brown*, 6 Week. Rep. 352.

ESCAPE.—*Liability of sheriff for escape*—5 & 6 Vic. c. 98—*Jurisdiction*.—Where a sheriff allows the escape of a prisoner arrested under a writ of attachment to enforce an order in a suit, the Court of Chancery has jurisdiction to enforce the sheriff's liability. The measure of his liability in Chancery, as well as at law, since 5 & 6 Vic. c. 98, is the loss actually occasioned by the escape, and not the whole amount for which the attachment issued. *Moore v. Moore*, 6 Week. Rep. 288.

FEME COVERT.—*Her equity to be recouped out of assets where her estate has been mortgaged*—*Bankruptcy of husband*.—Where a mortgage is made of the wife's lands to secure money borrowed by the husband, in the absence of evidence to the contrary, the loan will be presumed to have been obtained for his purposes; his estate, especially where he covenants to pay the debt, must, therefore, pay the mortgage money at the instance of the heir of the wife as well as the wife herself; although the husband may have paid off the mortgage and taken

an assignment in trust for himself and his executors, &c., for the wife, joining in the security, does not make it less the debt of the husband; and her estate is considered as surety only for the debt. Lord Cowper (*Tate v. Austin*, 1 P. Wms. 264) held, that all other debts of the husband should be preferred to this; however, Lord Hardwicke laid down that the creditors could not stand in the place of the mortgagees against the wife's estate (*Robinson v. Gee*, 1 Ves. 251). The rule is, that where the husband is seised of the legal estate *jure uxoris*, and husband and wife join in a mortgage of the estate, reserving the equity of redemption to the husband, and his heirs, the husband has the equity of redemption, as he before had the legal estate, that is—*jure uxoris*. And if such estate were equitable, so the equity of redemption remains equitable, but still *jure uxoris*, and equity throws this protection round the wife—that the deed shall operate no further than its particular purpose, unless there be some recital of intention that the husband shall take the benefit, or it is evident that the transaction was more than a mere mortgage transaction, or where the form of the equity of redemption has nothing to do with the limitation of the estate (Coote on Mortgages, 3rd edit., 1850, p. 523, 534). In the following case, which was before a bankruptcy commissioner, it appeared that there had been a devise of a freehold estate to A., a married woman, in fee. A. joined with her husband in a mortgage of her estate to secure an advance made to him, and which, by the deed, he covenanted to repay. The re-conveyance was, by the terms of the deed, to be made to the husband in fee; and in the event of a sale by the mortgagees, the surplus, if any, was to be paid to him, his executors, &c., for his and their own use and benefit. By an agreement executed a month afterwards, but which it was sworn was entered into at the time of and was the inducement to, A. to execute the mortgage deed, it was agreed that, as between A. and her husband, his estate was to be primarily liable to the payment of debts interests, and costs, and that, in the event of a sale by the mortgagees, the surplus, if any, should be paid to her. Upon the bankruptcy of the husband the estate was sold, with the concurrence of the assignees, but failed to realise sufficient to satisfy the mortgagees: Held, that having parted with the estate to her husband by executing the mortgage deed, it became his, and that, consequently, she was not entitled to be recouped out of the assets the value of such estate as against the creditors of her husband. *Exp. Smallpiece*, 30 Law Tim. Rep. 262.

FEME COVERT.—*Acquiescence in wrong investment*—Where proviso against anticipation, and where not.—A married woman cannot be bound by acquies-

cence in an improper investment of a fund to the income of which she is entitled for her separate use, with a proviso against anticipation—*quære*, whether she would be bound in the absence of such a proviso. *Davies v. Hodson*, 6 Week. Rep. 355.

FIXTURES.—*Tenant's Fixtures—Right to removal*—*Trade buildings.*—The cases on the right to remove fixtures differ so much that it is desirable to know what are the latest views of the court. In the following case V. C. Kindersley held that machinery, engines, plant, vats, or utensils, may be removed by a tenant as trade fixtures. Trade fixtures to be removable must be either capable of being removed bodily, or taken to pieces and put up again, so as to be identically what they were before; but this does not apply to brick buildings let into the freehold accessories adjuncts to trade fixtures, and which have no other existence or purpose, may be removed, although used as such accessories are not removeable. *Whitehead v. Bennett*, 6 Week. Rep. 351.

HUSBAND AND WIFE.—*Property of wife—Trust for her—Mortgage—Reservation of equity to husband—Mortgage or re-settlement.*—Where there is simply a mortgage by husband and wife of the wife's property, the mere reservation of the equity of redemption to the husband and his heirs, does not exclude the wife's right, and this is so where there has been a settlement of the property, followed by a mortgage, the two evidently forming part of one transaction. Thus, where the property of the wife was settled to the use of the joint appointment of the husband and wife, with remainders to the husband and wife, and issue of the marriage, with an ultimate remainder to the heirs of the wife, and, by a joint appointment dated two days after, they appointed the property to the use of the appointment of the husband, and, in default thereof, to the husband until his bankruptcy or insolvency, and then to the wife for life, and then upon the trusts of the settlement subsequent thereto; and by an appointment and lease and release dated four months afterwards, the husband mortgaged the property, and the equity of redemption was reserved to the husband and his heirs: Held, that the settlement, appointment, and mortgage, were to be treated as parts of one transaction, the intention of which was to enable the husband to raise money on the estate; but that, so far as that power was not exercised, the original settlement was to remain in force, and that the equity of redemption in the property belonged to the wife notwithstanding the reservation on the mortgage. *Heather v. O'Neill*, 30 Law Tim. Rep. 344.

HUSBAND AND WIFE.—*Contracts inter se without trustees—Articles of separation—Parent and child—Public policy.*—It is well settled, both in law

and equity, that according to the general rule husband and wife being regarded as one person, are incapable of contracting with each other. There is a well-known exception, however, with respect to the wife's contracts as to her separate estate, as to which she is always considered as a feme sole; and indeed the exception would prevail in every case where the wife could be regarded as having an interest, or occupying a position similar to that of a feme sole suing for a divorce, and an agreement for the compromise of the suit is just one of those cases where the wife is to be taken as being at arm's length with her husband, and in the position of a feme sole, and therefore capable of abandoning her suit, and contracting with her husband for provisions to be made or acts done by him as a condition for such abandonment. *Bateman v. The Countess of Ross*, 1 Dow, 235, was a strong case to this effect, in which Lord Redesdale affirmed the contract (between the husband and wife), both in Ireland, as Chancellor, and subsequently in the House of Lords. That case, as Lord Cottenham observed in *Wilson v. W.* (1 Ho. L. Cas. 578), was the more remarkable because it was a case in which Lord Eldon concurred with Lord Redesdale very shortly after he had discussed so ably and fully the case of *St. John v. St. John* (11 Ves. 526), and took off much of the weight of his observations in that case. The wife being in litigation with her husband, was there treated as being a feme sole, and it would be contrary, in fact, to public policy if she were not allowed to settle a suit in the Ecclesiastical Court without the intervention of a trustee to enter into covenants on her behalf. Where it is simply a question as to the husband's granting her an annuity in consideration of her abandoning her suit for divorce, such an agreement could be enforced, the stipulations being such as a court of equity could enforce against the wife. The power to contract however must be limited to those interests as to which she may be regarded as a feme sole. If the contract be extended, and provisions inserted in it not strictly relating to such interests, and therefore incapable of being enforced against her, the court cannot grant relief, as was decided by V. C. Wood in the following case, where, in consideration of the abandonment by a married woman of proceedings against her husband for a divorce on the ground of adultery and cruelty, an agreement for a separation was signed by husband and wife, a trustee being named in the agreement on behalf of the wife, but not made a party to it. The agreement, after providing for a certain separate income for the wife and for the protection of the husband, upon payment of such income from the wife's debts, contained certain provisions as to the children, of

whom two were to remain in the wife's custody, two with the husband, liberty to both parents to visit the children at school; provisions as to their Protestant education; husband, in case of death of either of the children with the wife, to be at liberty to place another with her: Held, that although the wife might contract with her husband to abandon a suit against him in the Ecclesiastical Court, and for provisions on his part as a condition therefore without the intervention of a trustee, this power of the wife to contract was limited to such interests as to which she could be regarded as a feme sole, and which could be enforced against her. Demurrer allowed to a bill by the wife for specific performance of the above-stated agreement, on the ground that the provisions as to the custody and education of the children were such as could not be enforced against the wife, and were also against public policy. *Vansittart v. Vansittart*, 6 Week. Rep. 288.

LEASE.—*Agreement to demise not under seal—Uncertainty*—8 & 9 Vic. c. 106, s. 3.—The following decision relates to the specific performance of a contract for a lease where there were some uncertainties in subsidiary matters, but the main provisions were ascertained. The effect of the 8 & 9 Vic. c. 106, s. 3, enacting that leases required by law to be in writing are to be void unless made by deed, was also considered. By an agreement in writing, a landlord agreed to let to a tenant certain lands for a definite term at a fixed rent. The tenant, however, was to perform certain acts—as leading or carrying materials for building and draining, which were to be done by the landlord, and there were stipulations that new hedges were to be made and planted by the landlord, and that gates, buildings, &c., were to be left in repair; also, that the landlord reserved to himself all customary rights and reservations, such as liberty to cut and plant timber, search for and work mines, minerals, &c. The agreement was signed by landlord and tenant: it was held, that inasmuch as the subject-matter, the term, and the rent were certain, the uncertainties in the subsidiary part of the lease, even in the use of the expression, &c., were not sufficient to prevent the tenant from having specific performance of the agreement: Held, also, that the 3rd section of the 8 & 9 Vic. c. 106, which enacts that every lease required by law to be in writing shall be void at law, unless made by deed, did not exclude the jurisdiction of the court in this case. *Parker v. Taswell*, 30 Law Tim. Rep. 347.

MORTGAGE.—*Redemption—Validity of sale by mortgagee under a power—Sale to mortgagee's brother and repurchase afterwards.*—Wherever a power is given, whether of raising portions in a settlement or of sale in a mortgage-deed, or giving dominion over property for a specified purpose, the Court of Chan-

cery requires that it shall be exercised with a view only to effecting the legitimate purpose of the power. If it be used by the donee for other purposes, from any ill motive, this is a fraud on the power. In the following case, it was shown to be the undisguised intention of the mortgagee, in exercising the power, to exclude the mortgagor, and to reimburse himself the debt of other persons; and the mortgagee himself got into possession of the property under an assignment from his own vendee, who was also his brother: these were held to be sufficient leading circumstances, without entering into minor facts, to render the power of sale invalid, as exercised by the mortgagee. The facts were as follows:—The owner of two fourth shares in a newspaper mortgaged the same in 1840 to the defendant by deed, with proviso for redemption, and with a power of sale to the mortgagee in default of payment, as specified therein. Default having been made in payment, the defendant, the mortgagee, in exercise of the power of sale, by deed, in 1841, for an expressed consideration of £1,000 assigned the two shares to his brother absolutely, freed from the mortgage debt. Afterwards the owner of the two remaining fourth shares assigned them for the benefit of his creditors to trustees, who sold them to the defendant; and in 1848, defendant's brother assigned the two first-mentioned shares to the defendant, who thus became legal owner of the whole newspaper. The mortgagor died in 1852. In 1855 the plaintiff, who was the sole personal representative of the mortgagor, filed a bill for redemption, alleging that the pretended sale in 1841 was a mere fraud for the purpose of excluding the mortgagor from the property; that no consideration passed; and that the defendant never accounted to the mortgagor: Held, that the plaintiff was entitled to redeem. *Robertson v. Norris*, 30 Law Tim. Rep. 259.

MORTGAGE.—*Foreclosure—Account—Sale*—15 & 16 Vic. c. 86, s. 48.—By the 15 & 16 Vic. c. 86, s. 48, the court may in a *foreclosure* suit direct a sale; and it has been supposed that the plaintiff cannot pray a sale, but must ask for a foreclosure. In the following case mortgages in trust were held entitled to file their bill for an account and sale without praying foreclosure, notwithstanding that their mortgage security contained an express power of sale: the judge, however, put the case on the ground of the special circumstances of the transaction. *Hutton v. Sealy*, 6 Week. Rep. 350.

MORTMAIN.—*Tithe redemption trust.*—A bequest of pure personality to a charitable association, the sole object of which is the purchase and restoration to the church of impropriated tithes, is void under the Mortmain Act. *Denton v. Manners*, 6 Week. Rep. 238.

SETTLED ESTATES.—*Leases and Sales of Settled Estates Act, s. 38—Solicitor—Examination of married woman residing abroad.*—A person appointed to examine a married woman under the 38th section of 19 & 20 Vic. c. 20, must be an officer of the court—viz., a solicitor taking out his certificate in this country. *Re Turner*, 6 Week. Rep. 355.

STATUTE OF LIMITATIONS.—*Acknowledgment by payment.*—A suit for the winding-up of partnership accounts was instituted between the representatives of deceased partners. A receiver was appointed in June, 1834, and by common consent paid the assets which he got in to the representatives of one of the deceased partners, and the suit was not further prosecuted. The executors who received these payments claimed a further debt from the estate of the other partner, which was barred by statute, unless the receiver's payments were sufficient to take it out of the statute. There was an independent claim for a lien which the evidence was not considered by the court to establish, and it was held that payments by the receiver within twenty years did not take the case out of the statute. *Whitley v. Lowe*, 6 Week. Rep. 236.

SUBSTITUTED EXECUTOR.—*In case of death of one of original executors.*—In *re Lighton* (1 Hagg. 235) a testator having appointed two executors, and provided that on the death of either of them two others should be substituted on the death of the original executor who had proved the will, and on a proxy of consent from the other, probate was granted to one of the substituted executors, it appearing to have been the testator's intention that the substitution should take place on the death of either of the original executors, whether happening in the testator's lifetime or afterwards. This decision was acted on in the following case. A. appointed B., C., D., and E. executors of his will; and in case of the death of B., F. to be executor in his place. B., C., D., and E. proved the will. B. and C. died. F. applied to have a double probate granted to him, D. and F. opposing that grant: Held, that F. was entitled to the grant, and that the casualty was not restricted to the death of B. in A.'s lifetime. *Re Johnson*, 6 Week. Rep. 275.

WINDING-UP.—*Two petitions—Error in one petition—Costs.*—Two petitions being presented, one by a shareholder and the other by a creditor, for winding-up the same company—the first petition is wrongly entitled, and on objection taken, leave to amend is refused. On the second petition a conditional order is made for payment in a certain time, or, in default for winding-up, default is made; but pending the creditor's petition and before order made on it, the shareholder presents another petition to wind up. On the question of costs: Held,

that the shareholder must pay the costs of the wrongly-entitled petition, and the costs of the parties served upon the second petition. *Re The South Essex Gaslight and Coke Company*, 6 Week. Rep. 234.

EQUITY PRACTICE.

COPIES OF DOCUMENTS.—*Solicitors' charge*—Costs—15 & 16 Vic. c. 86, ss. 18, 20.—A defendant's solicitor, who himself furnishes copies of documents which the plaintiff has a right to take, under the above act, will not be permitted to charge for them at the rate of fourpence per folio, but will be allowed only stationers' charges actually incurred. *Kennedy v. George*, 6 Week. Rep. 218.

PARTIES.—*Next of kin*—*Demurrer*—15 & 16 Vic. c. 86, s. 42—*Serving absent parties with notice of decree.*—In an administration suit certain persons, whom the plaintiff in his bill stated that he believed to be the next of kin of the testator, were not made parties to the record, but the plaintiff alleged, in his bill, that he intended to serve them with notice of any decree which might be made. A demurrer for want of parties was overruled. *Snepp v. Snepp*, 6 W. Rep. 355.

STOCK.—53 Geo. 3, c. 60—*Transfer of unclaimed stock.*—Where stock was transferred to the commissioners for the reduction of the national debt under the provisions of 56 Geo. 3, c. 60, and after many years a person claimed as administrator of the survivor of two persons, in whose name it had stood. Order made directing inquiries, as in *Ex parte Ram*, 3 Myl. and Cr. 25. *Re Bishton*, 6 Week. Rep. 289.

TRUSTEES.—*Trustee Relief Act*—*New trustee appointed to whom old trustee objected*—Costs.—A trust fund was paid into court by a trustee upon being informed that a new trustee, to whose proposed appointment he had previously objected on the ground that he was unknown to him and believed not to be a fit and proper person, had been appointed joint trustee with him over the fund: Held, that the trustee was entitled to receive his costs upon the petition of the *cestui que trust* for a transfer of the fund to new trustees. *Re Williams*, 6 Week. Rep. 218.

COMMON LAW.

ACCIDENTAL DEATH.—*Railway company*—*Liability to stranger for injury from defective machine*—*Privy.*—A railway company, where goods were sent by mileage rates, left the unloading of the goods to the consignee, and provided, at their station to be used, if necessary, by the consignee gratuitously, a crane for the unloading of heavy goods. A consignee, to whom certain blocks of stone had been sent by mileage rate, having received notice from the

company to remove the blocks by the crane, he called a bystander, not a servant of the company, to assist, who accordingly did so; the chain of the crane was defective to the knowledge of the company, and it broke while the block was being raised, in consequence of which the man so giving his assistance was killed: Held, in an action by his administratrix under Lord Campbell's Act, that the company was not liable for the injury. The gratuitous lender of an article unfit for use, to his knowledge, is not liable to a person whose use of it he has not foreseen for an injury caused by the unfitness. *Blackmore v. The Bristol and Exeter Railway Company*, 6 Week. Rep. 336.

ACCIDENTAL KILLING.—*Lord Campbell's Act*, 9 & 10 Vic. c. 93—*Two companies using same line*—*Accidental killing by one company's train of servant of the other company.*—The rule is now fully established that a master is not liable for the accidental killing of, or injury to, a servant caused by the negligence of a fellow servant of the deceased or injured party. Two railway companies used in common one railway entrance, and east and west sidings; when one of the company's servants was at work on one of the sidings repairing some of his master's carriages, an engine and train belonging to the other company came up and killed him. Both companies had rules alike to be observed by their servants as to passing trains, &c., but there was no person specially kept on the platform entrance to look out for approaching trains to give notice thereof to the workmen employed. In an action brought by the executrix and widow of the deceased (under Lord Campbell's Act) for compensation from the owners of the train by which her husband was killed, the jury found the engine-driver, the shunter, the man who took care of the points at the sidings, and the deceased, were not guilty of any negligence, but that the rules were insufficient, and the defendants were guilty of negligence, and returned a verdict for the plaintiff for £300: Held, by the court, that the verdict was right. *Vase v. The Lancashire and Yorkshire Railway Company*, 80 Law Tim. Rep. 289.

ACTIONS AGAINST PUBLIC BODIES.—*Right of action against local board of health*—11 & 12 Vic. c. 63, ss. 139, 144.—In the case of the *Feoffees of Heriot's Hospital v. Ross* (12 Cl. and Fin. 607), it was held that if charity trustees are guilty of a breach of trust, the person thereby injured has no right to be indemnified by damages out of the trust fund. That was a Scotch case; but it was also there held that the law in this respect is the same both in England and Scotland. That decision was founded on a previous Scotch case in the House of Lords, *Duncan v. Findlater* (6 Cl. and Fin. 894), in which it was decided that trustees appointed under

a public road act are not responsible for an injury occasioned by the negligence of the men employed in making the road, and that the funds raised by such act cannot be charged with compensation for such an injury. In the following case it was argued that the same principle was applicable to the boards of health, as there was no fund applicable to the payment of damages; but the court decided otherwise on the words of the statute, holding that an action is maintainable against a local board of health for negligence in the construction, management, and direction of a sewer within their district, whereby damage has been sustained; notwithstanding that s. 144 of the Public Health Act, 1848, directs that compensation, the amount of which is to be settled by arbitration, shall be made out of the rates to all persons sustaining any damage by reason of the exercise of any of the powers of the act; and also, notwithstanding that the board has no property except by means of the rates levied on the ratepayers. *The Itchin Bridge Company v. The Local Board of Health of Southampton*, 6 Week. Rep. 223.

CARRIERS.—Loss of goods.—Action.—Payments of compensation to consignor.—It is laid down in 2 Wms. Saund. 479, that the bare fact of the plaintiff in an action against carriers having been the person who delivered goods to them to be carried, does not enable him to maintain an action on the bailment. In the following case, it was held that it is no answer to an action against carriers by the owner of goods lost (who was consignee), that the consignor after the loss of the goods claimed compensation, and that the carriers, without notice, and believing him to be the owner, paid compensation to him. *Coomes v. The Bristol and Exeter Railway Company*, 6 Week. Rep. 335.

CARRIERS.—Liability.—Damage.—Ultra vires.—Railway company not conveying by their line.—A railway company undertaking to carry by other means than their line, cannot set up, as a defence for damage done to goods, that such contract was made *ultra vires*. *Willey v. The West Cornwall Railway Company*, 30 Law Tim. Rep. 261.

CARRIERS.—Duty of carriers on refusal of the consignee to receive goods.—There is no general rule of law requiring carriers to give notice to the consignor of the refusal of the consignee to receive goods, but carriers are merely bound to do what is reasonable under the particular circumstances of each case. A cask of gin having been sent by the plaintiff, a spirit merchant in London, to his customer at Brecon, by the defendants, and the customer having refused to receive it on the ground that he had not ordered it, the defendants' agent placed it in a warehouse, where it remained three months, when it was found that a part of the

contents had escaped by leakage. It appeared that the fact, that the cask was leaky at the bung, had been noticed by one of the defendants' agents during its transmission. In an action against the defendants as common carriers, the jury were directed that there was no general law requiring a carrier to give notice of such a refusal by the consignee, but that it might be reasonable under some circumstances, and that the jury were to say whether, under the circumstances, the defendants had done what was reasonable. The jury having found for the defendants: Held, that the direction was right, and that there was no ground for disturbing the verdict. *Hudson v. Bazendale*, 27 L. J. Ex. 93.

COLONIES.—Legislative bodies in the colonies.—Their rights and authority.—Contempt.—Lex et consuetudo Parliamenti.—The principal point in the following case is of great importance, involving as it does, on the one hand, the constitutional rights and authority of the legislative bodies in various parts of her Majesty's colonial territories, and on the other the right to personal liberty (unless deprived of it by law) which her Majesty's subjects take with them, as part of their birthright, to every portion of her dominions. The subject is not new; it has been discussed before on more than one occasion. In the case of *Beaumont v. Carrett*, from Jamaica (1 Moore, P. C. C. 59, A. D. 1836), it was decided that an assembly possessed of supreme legislative authority had the power of punishing contempts; that the power was inherent in such an assembly, and incident to its legislative functions; and according to the judgment in that case, every colonial assembly or council possessed the same authority to punish for contempts which the House of Commons has exercised in this kingdom for a long series of years. But, in 1842, the same question (in substance) came before the Privy Council, in the case of *Kielly v. Carson* (4 Moo. P. C. C. 68), on an appeal from Newfoundland, and since argued the second time before the Lord Chancellor, two noble members of the committee who had formerly held the Great Seal, the three chiefs of the common law courts in Westminster Hall, two out of the four members of the court, who were present at the decision of the case of *Beaumont v. Barrett*, the Vice-Chancellor, and Dr. Lushington, and on that occasion (4 Moore, P. C. C. 84) their lordships were of opinion that the House of Assembly did not possess the power of arrest, with a view to adjudication, on a complaint of contempt committed out of its doors. They held that the power of the House of Commons, in England, was part of the *lex et consuetudo Parliamenti*, and the existence of that power in the Commons of Great Britain did not warrant the ascribing it to every Supreme Legislative Council or Assembly

in the colonies. In the following case, the Judicial Committee of the Privy Council have also decided that Legislative Councils or Assemblies in the colonies, whether their authority be derived from the Crown, or a statute of the Imperial Parliament, do not possess the same authority to punish for contempt which the House of Commons exercises in this kingdom. The *lex et consuetudo Parliamenti* apply exclusively to the Lords and Commons of this country, and do not apply to the Supreme Legislature of a colony by the introduction of the common law there. *Fenton v. Hampton*, 6 Week. Rep. 341.

DISTRESS.—*Execution—County Court Act*, 19 & 20 Vic. c. 108, s. 75—*Goods of third party seized in execution—Distress for rent.*—The 19 & 20 Vic. c. 108, s. 75 (3 L. C. 69—80), provides, that “sec. 1 of the act 8 Anne, c. 14, shall not apply to goods taken in execution under the warrant of a county court; but the landlord of any tenement in which any such goods shall be so taken may claim the rent thereof at any time before the removal of the goods, by delivering to the bailiffs or officer making the levy any writing signed, &c., which shall state the amount of rent, &c.; and if such claim be made, the bailiff or officer making the levy shall, in addition thereto, distrain for the rent so claimed, and the costs, &c.; and the bailiff shall afterwards sell such of the goods under the execution and distress as shall satisfy, first, the costs of, and incident to, the sale; next, the claim of such landlord, not exceeding, &c.; and, lastly, the amount for which the warrant issued; and in either event the overplus of the sale, if any, and the residue of the goods, shall be returned to the defendant.” In the following case, it was held that the goods of a third party improperly taken in execution on the defendant's premises, under the warrant of a county court issued against the defendant's goods, are not distrainable under 19 & 20 Vic. c. 108, s. 75, that section applying only to goods of the execution debtor. *Bread v. Knight*, 6 Week. Rep. 226.

EXCESSIVE DISTRESS.—*Selling goods distrained within the five days—No damage sustained.*—A distress was taken for rent, and goods, instead of being retained for the five days, were sold a day too soon, for which the plaintiff brought an action; no evidence was given that the plaintiff had sustained any damage thereby, and the learned judge directed a verdict for the defendant: Held, that this was correct; the 11 Geo. 2, c. 19, s. 19, only entitles the tenant to recover in an action for an irregularity in dealing with a distress where actual damage is proved: Held, also, that an amendment of the declaration at the trial by inserting a count for distraining and selling goods for a greater amount than the rent due, was properly refused by the

judge, as the matter was not in dispute at the commencement of the action. *Lucas v. Tarleton*, 30 Law Tim. Rep. 369.

INCOME TAX.—*Landlord and tenant—Deduction by tenant—Demise of brick clay—Royalty—Rent.*—By the 5 & 6 Vic. c. 35, schedule D., “for all lands, tenements, and hereditaments in Great Britain there shall be charged yearly in respect of the property thereof for every 20s. of the annual value thereof the sum of 7d.; and by section 60 the annual value of lands, &c., shall be understood to be the rent by the year at which the same are let at rack rent, if the amount of such rent shall have been fixed by agreement commencing within the period of seven years preceding the 5th day of April next before time of making the assessment; but but if the same are not let at rack rent then at the sum at which the same are worth to be let by the year, such rule to be construed to extend to all lands, tenements, hereditaments, and heritages, capable of actual occupation of whatsoever nature, or for whatever purpose occupied or enjoyed, and of whatever value except the properties mentioned in No. 1 and No. 3 of the 3rd schedule. No. 3 of schedule 17 provides that the duty in each of the three rules is to be charged on the person carrying on the concern, or being in the receipt of the profits; and before paying the produce or value, either between different persons engaged in the undertaking, or to the owner of the soil or property, with power to deduct.” In the following case it appeared that a lease demising a parcel of land, with liberty to take clay, &c., and make bricks, contained three reservations—namely, an annual sum of £17 10s. for surface rent; a royalty or brick rent £100 by the year; and a sum of 2s. for every thousand bricks made in one year over a million; each sum was declared by the lease to be free of all deductions except for landlord's property and income tax. The tenant claimed to deduct from his landlord property or income tax on each: Held, that he was entitled to make the deductions, the two first payments being rent, and the third, if not rent, still a payment with reference to which the parties had agreed the deduction should be made. *Semle*, per Martin, B., Watson, B., and Channell, B., that the landlord was assessable to income tax in respect of the 2s. payable for each thousand over a million bricks made on the demised premises in the course of a year under 5 & 6 Vic. c. 35, s. 1, and that the deduction was properly made under schedule A., No. 3. *Edwards v. Eastwood*, 6 Week. Rep. 331.

JOINT-STOCK BANK.—7 & 8 Vic. c. 113, s. 21—*Liability of executors of shareholder whose name appeared upon a memorial filed after his death.*—The 7 & 8 Vic. c. 113, s. 21, enacts, “that the persons

whose names shall appear from time to time in the then last-mentioned memorial, and their legal representatives, shall be liable to all legal proceedings under this act, as existing shareholders of the company, and shall be entitled to be reimbursed, as such existing shareholders only, out of the funds or property of the company for all losses sustained in consequence thereof." It appeared, in the following case, that a person of the name of Walton was a shareholder in the Royal British Bank, and his name appeared upon several memorials, and, lastly, upon one filed in June, 1856, at which time he was dead. The plaintiffs were judgment creditors of the company, and issued execution against the goods of the company without effect. It was then sought to issue execution against the executors of Walton: Held, that "legal representatives" in stat. 7 & 8 Vic. c. 113, s. 21, applies only to the representatives of persons who had themselves once been liable; and that, as Walton was dead when the last-mentioned memorial was filed, he was not a person whose name was upon the memorial, and could not have been proceeded against; and that his representatives, therefore, were not liable to an execution upon the judgment against the company. *Powis v. Butler*, 30 Law Tim. Rep. 259.

JURISDICTION.—*International—Jurisdiction of Scotch courts over persons resident in England.*—An English corporation, or any person domiciled in England, is liable to be sued in a Scotch court in most personal actions (not involving questions of personal status), and wherever the cause of action may have arisen, provided only there is some money due to such person by some one resident in Scotland; or provided, there is some property, however trifling of such person found within Scotland, which may be attached, the attachment being held to confer such jurisdiction on the Scotch courts. *London and North Western Railway Company v. Lindsay*, 30 Law Tim. Rep. 357.

LIMITATIONS, STATUTE OF.—*Real estate—Ejectment—Statute of Limitations*, 3 & 4 Will. 4, c. 27—*Letter of admission by a land agent—Evidence against his principal—Tenancy at will.*—A tenancy at will must be created by the agreement of the parties, or it may arise from the relation of the parties, where there is a will on both sides, that the one shall take the land of the other (*Doe v. Chamberlain*, 5 M. and W. 14). By the 3 & 4 Will. 4, c. 27, s. 7, in the case of a tenant at will the right to bring an action is to be deemed to have accrued at the end of one year after the commencement of the tenancy. By sec. 14, an acknowledgment in writing signed by the person in possession (not mentioning an agent, &c.) of the title of the person entitled to the property, is to be deemed equivalent to the possession or

receipt of the rent of the property. In the following case, which was an action of ejectment, it appeared that the plaintiff was seised of an undivided third part of land which had been held by one Thomas the owner of the other undivided two-thirds under a lease made in 1765, which expired in 1818. Thomas died in 1826, Peter (the father of defendant, who had married Thomas's daughter) succeeded, and at his death was the owner of the two-thirds; the defendant, on the death of his father in 1836, became entitled to the two-thirds in possession, and so remained. Hitherto there was no evidence to show possession or receipt of rents of the one-third, since the expiration of the lease in 1818, by the plaintiff or those under whom he claimed; nor any evidence to show under what circumstances it was occupied, if at all, by Thomas or defendant's father. The following letter was written by Mr. Joseph Newton (the receiver of rents and general lands agent of the defendant) to Mr. Millett, solicitor, Penzance, the acting agent of the plaintiff Mr. Ley:—Sir, in reply to your letter respecting Ventom Gimps, I beg to inform you that Mr. Peter has sold his interest in that property to Mr. Hodges, of Truro, a saddler. Mr. J. T. H. Peter is now in possession of his two-thirds of the meadow referred to by you, and who will, no doubt, accept a lease (three lives) for Ley's one-third at a fair rack-rent. You must be aware that Mr. Peter, jun., is not bound to pay rent for Ley's one-third during the time his father held the meadow; but no doubt he will do so in case you agree for a lease. I have given notice to Mr. Jago of your meeting on Saturday, the 17th inst.—I am yours truly, Joseph Newton.—P. S., will you favour me with the terms of your lease of the one-third of the meadow, that I may lay it before Mr. Peter, jun." This action of ejectment was brought in May, 1857: Held, first, that this letter by the land agent of the defendant was not a sufficient acknowledgment binding on the defendant to prevent the operation of the Statute of Limitations; also, secondly, that there was no evidence of a tenancy at will, created within twenty years, and therefore, was not within the 7th section of the Statute of Limitations; and the plaintiff was not entitled to recover; *Martin, B.*, on the second point, dissentiente. *Ley v. Peter*, 30 Law Tim. Rep. 367.

MASTER AND SERVANT.—*Accident to workman—Liability of employer.*—The following case shows the disinclination of the courts to fix upon a master a liability in respect of anything done for the carrying on his business, and from which an injury arises to a servant in his employ. A hoarding was erected so far into the road that a cart in passing struck against it, causing things to fall, whereby one of the workmen became injured. The workmen had

before complained of the hoarding, but nevertheless had continued working there voluntarily. In an action against the master, his employer, for the improper erection of the hoarding, the cause of the accident: Held, that the action was not maintainable against the master in respect of an injury occurring in that way; and, also, that from the part the master took in it in this case, it was too remote to support the action. *Assop v. Yates*, 30 Law Tim. Rep. 290.

MASTER AND SERVANT.—*Contract of service—Dissolution of partnership—Nominal damages—New trial.*—Where a clerk has entered into the service of a partnership for a term of years, and upon a change of partners consents to cancel the old agreement upon a new agreement, with the new firm being entered into, and thereupon he enters into the service of the latter firm, the question for the jury is simply whether or no a new agreement has been entered into. The court will not grant a new trial, on the ground that the plaintiff is entitled to nominal damages, if nominal damages have not been claimed at the trial. *Quære*, whether a mere change of partners is a breach of contract to employ for a term of years. *Hobson v. Cowley and Madeley*, 6 Week. Rep. 384.

METROPOLIS LOCAL MANAGEMENT ACT.—*Sections 119 & 120—Obstruction in a street—Building in front of houses.*—In the Mile-end-road there is between the paved footway and the carriage way an intermediate space, which the occupants of the houses on either side have, by the permission of the lord of the manor of Stepney, to whom the soil belongs, been in the habit of using for their respective purposes, as for the repair of carriages, the sawing of stones, the erection of moveable sheds, &c.; and subject to such user, the public have always, as of right, passed over the space in question when convenience required: Held, that a shed erected by the keeper of a public-house on the portion of the space opposite his house was not an obstruction to a street which the local authority was entitled to remove under ss. 119 or 120 of the Metropolis Local Management Act, 18 & 19 Vic. c. 120. *Le Neve v. The Vestry of Mile-end Old Town*, 6 Week. Rep. 338.

METROPOLIS LOCAL MANAGEMENT ACT.—18 & 19 Vic. c. 120—*Action on contract made with the board of works of the Whitechapel district—Transfer of liability.*—An action commenced after the passing of 18 & 19 Vic. c. 102, on a contract entered into before the passing of that act, with the old trustees under a local act, having duties, powers, and authorities in relation to the cleansing a parish included in a district mentioned in schedule B. of 18 & 19 Vic. c. 120, is properly brought against the board of works of such district. *Sinnott v. The*

Board of Works of the Whitechapel District, 6 Week. Rep. 289.

POLICIES OF INSURANCE.—*Action by executors of deceased underwriter against insurance brokers for premiums—Claim of defendants to set off a loss upon a policy unadjusted at the death of the underwriter.*—In the following case, an attempt was made to set up a custom as between underwriters and insurance brokers with respect to their mutual rights and liabilities on the various transactions between them. The court held that in an action by executors of a deceased underwriter for premiums upon policies due in his lifetime, the defendants, the insurance brokers, cannot (either by way of legal or equitable defence) set off losses upon policies unadjusted at the time of the underwriter's death, unless there be some express agreement or established custom to that effect. And in a case where such a custom was set up, the court being empowered to draw inferences of fact from the evidence: Held, that the existence of the custom could not properly be inferred from the evidence laid before it. *Beckwith v. Bullin*, 30 Law Tim. Rep. 284.

PUBLIC COMPANY.—*Debentures—Unauthorised borrowing of money by directors—Construction.*—It is no defence to an action on debentures under the seal of a public company that the directors had not sufficient authority under the deed of settlement to borrow the money. When there are clauses in a deed of settlement enjoining strict formalities in the making of contracts, these provisions must, notwithstanding general words, be confined to the class of contracts mentioned in these clauses. *Quære*, per Williams, J., whether these provisions to control the common law are legal. *Agar v. The Official Manager of The Athenæum Life Assurance Society*, 6 Week. Rep. 277.

PUBLIC COMPANY.—*Joint-stock company—Contract with director—Confirmation by shareholders—Joint-Stock Companies Registration Act, 7 & 8 Vic. c. 110, s. 29.*—The Joint-Stock Companies Registration Act, 7 & 8 Vic. c. 110, s. 29, prohibits contracts in which directors are interested, "except a policy of assurance, grant of annuity, or contract for the purchase of an article or of service, which is respectively the subject of the proper business of the company, such contract being made upon the same or like terms as any like contract with other customers or purchasers," unless submitted to a general or special meeting of the shareholders, and confirmed by them. A director of a life assurance company was appointed by a resolution at a meeting of directors agent of the company for the establishment of agencies in the provinces, to be paid by a commission, but such appointment was not submitted to or confirmed by the shareholders: Held, that the

contract was rendered void by the 29th section, and that he could not maintain an action against the company for his commission. *Semble*, that the contracts for the purchase of articles or of service to which the exception refers are such contracts only where the company sells to the director, or renders to him a service, which it is the proper business of the company to sell or render, and not any contract where the director contracts to sell or render a service to the company. *Poole v. The National Provincial Life Assurance Company*, 6 Week. Rep. 211.

RAILWAY AND CANAL TRAFFIC ACT, 1854.—*Undue preference.*—Where a railway company charged lower rates to the tenants of a large coal owner than they did to other persons, and justified their doing so on the ground that the coal owner had threatened to construct a competing line of railway, and that he had been put to great expense in constructing works for the purpose of bringing his coals down to the defendant's railway: Held, that this was no justification, and that the variation in charge was an "undue preference." *Harris v. The Cockermouth and Worthington Railway Company*, 6 Week. Rep. 209.

RAILWAY COMPANIES.—*Carriage of cattle.—Special condition—Reasonableness—Injury by defective truck—Statute 17 & 18 Vic. c. 31.*—The following decision as to the right of railway companies to limit their liability in respect of the carriage of horses has given rise to much discussion as to its propriety. In the case of *Simon v. Gt. West. Rail. Co.* (18 C. B. 805), the Court of Common Pleas held, that the 15th clause of the notice of the Gt. West. Rail. Co.—namely, "that goods conveyed at special or mileage rates must be loaded and unloaded by the owners or their agents, and the company will not be responsible for any risk of stowages, loss, or damage, however caused, nor for discrepancy in the delivery as to either quantity, number, or weight; nor for the condition of articles so carried, nor for detention or delay in the conveying or delivery of them, however caused,"—was reasonable within the act. In *Pardington v. The South Wales Rail. Co.* (1 H. and N. 68), the Court of Exchequer held that a memorandum relating to live animals, that "the company are to be held free from all risk and responsibility in respect of any loss or damage arising on the loading or unloading from suffocation, or from being trampled upon, bruised, or otherwise injured in transit, from fire, or from any other cause whatever," was reasonable. In the following case, it appeared that a railway company, upon receiving horses to be forwarded by a goods train, required the sender to sign a ticket containing the following memorandum: "This ticket is issued subject to the owner's undertaking all risks of conveyance, loading, and unload-

ing, whatsoever, as the company will not be responsible for any injury or damage, howsoever caused, occurring to any live stock of any description travelling upon the Y. and L. railway, or in their vehicles." The horses were put by the servants of the company into a truck, which was, to external appearance, and so far as they knew, sufficient, but which, in point of fact, was insufficient for the purpose, and during the journey the horses were, by reason thereof, injured: Held, first, that the condition was reasonable; secondly, that the damage by reason of the insufficiency of the truck was a risk of conveyance, and that the company was protected from liability by the notice. *M' Manus v. The Lancashire and Yorkshire Company*, 6 Week. Rep. 388.

SHIPPING.—*The Merchant Shipping Act, 1854, s. 352—Licence of pilot to be delivered up when required.*—The 352nd section of 17 & 18 Vic. c. 104, obliges, under a penalty, every qualified pilot, when required by the pilotage authority who appointed him, to deliver up his licence: Held, that the pilotage authority need not assign any reason for requiring the licence to be delivered up. *Henry v. The Master Pilots and Brethren of the Trinity House*, 6 Week. Rep. 232.

STATUTE OF LIMITATIONS.—*Mercantile Law Amendment Act, 1856—Retrospective effect—Payments by one of two co-debtors—Knowledge and consent of other co-debtor.*—The 19 & 20 Vic. c. 97, s. 14, enacts that in reference to 21 Jac. 1, c. 16, s. 3, and 3 & 4 Will. 4, c. 42, s. 3, where there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, no such co-contractor or co-debtor shall lose the benefit of either of the said enactments so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other of such co-contractors or co-debtors. It has been decided by the Court of Queen's Bench, that part payment by one co-debtor within six years before the commencement of suit, and before the passing of 19 & 20 Vic. c. 97, s. 14, does not prevent the operation of the Statutes of Limitation in favour of another co-debtor, following the authority of *Kindersley, V. C.*, in *Thompson v. Waithman* (3 Drew. 628; 5 Week. Rep. 30). Mere knowledge and consent by one co-debtor to payments made by another co-debtor do not prevent the operation of these statutes in favour of the non-paying co-debtor. *Jackson v. Woolley*, 6 Week. Rep. 228.

SUCCESSION DUTY.—16 & 17 Vic. c. 51, s. 21—*Successor, insane or a feme covert, dying before instalments of duty are payable—Successor competent to dispose by will of a continuing interest.*—The Succession Duty Act, 16 & 17 Vic. c. 51, s. 21, by which instalments, not become due at the death of a

"successor," cease to be payable, "except in the case of a successor who shall have been competent to dispose by will, of a continuing interest," refers to the quantity of interest and not to the personal capacity of the individual. A person, therefore, becoming entitled to the disposable interest of a "successor" who, being insane or a feme covert, dies intestate before all or any of the instalments of succession duty are payable, is liable to the payment of such instalments. *The Attorney-General v. Hallett*, 27 L. J. Ex. 89.

COMMON LAW PRACTICE.

AMENDMENT.—*Date of writ*—*Statute of Limitations*.—The court refused to allow the date of a writ of summons to be altered for the purpose of preventing the plaintiff's claim from being barred by the Statute of Limitations. *Clarke v. Smith*, 30 Law Tim. Rep. 291.

COUNSEL AND ATTORNEY.—*Settling cause in court at Nisi Prius*—*Client afterwards refusing to be bound thereby*—*Powers of counsel and attorney*.—The following case is one of warning to solicitors respecting the settlement of actions in court without having the express consent of the client to the proper compromise. The female plaintiff consulted a counsel residing in the country upon the subject of her rights for seduction and breach of promise of marriage against the defendant. The counsel himself then wrote to him; but as terms could not be effected, the counsel recommended her to an attorney to bring the actions, and what required to be done by an attorney was done in his office by his clerks. The plaintiff never spoke to the attorney himself. At the assizes where the causes were ready for trial, the female plaintiff and her mother, in a conversation upon terms of settlement, told the managing clerk to settle on the best terms he could; the counsel who had sent her to the attorney was her junior counsel in the case. Terms of settlement were come to in court, when he was present, and these terms indorsed on the briefs of the leading counsel for plaintiffs and defendant. Afterwards she refused to be bound thereby, and repudiated the terms come to, saying she had not authorised them: Held, that there must be a new trial under the circumstances, her attorney to pay the costs, and of the rule for it. If she authorised the terms, then she would pay those costs. If she did not, they would properly fall upon her then attorney. *Brooks v. Cox*, 30 Law Tim. Rep. 288.

DEATH OF PLAINTIFF.—*Between trial and judgment*—*Motion to enter nonsuit*.—Where a verdict is found for the plaintiff at the trial, with leave reserved to the defendant to move to set it aside and enter a nonsuit, and the court directs a nonsuit to

be entered, and after it is so entered it is discovered that between the time of the trial and the judgment of the court the plaintiff died, the court will direct the nonsuit to be entered as of the time of the trial. *Moore v. Roberts*, 30 Law Tim. Rep. 287.

DEFENDANT ABROAD.—*C. L. P. Act, 1852, s. 18*—*Proceeding against a defendant residing out of the jurisdiction*—*Cause of action where arising*—*Promissory note payable in London*—*Presentment*.—The following is an important decision upon the provisions of the C. L. P. Act, 1852, allowing service of process out of England, but requiring certain proofs before leave is given to proceed in the action where the defendant has not appeared; it having been held by the Court of Exchequer that where there is a contract with reference to some act to be done within the jurisdiction of the superior courts, it is immaterial where such contract is made; and if such act is so done, it brings the cause of action within the jurisdiction, so as to authorise a judge to make an order to proceed against a defendant abroad under C. L. P. Act, 1852, s. 18. Action by payee against maker on a promissory note, payable at Jones, Lloyd, and Co., four months after date, made and delivered abroad, but duly presented here: Held, that the judge had properly made an order for plaintiff to proceed against defendant residing abroad under the above section. *Fife v. Round*, 30 Law Tim. Rep. 291.

EXECUTION.—*Elegit*—*Second elegit against same lands*—*Sheriff's poundage*—*Statutes 29 Eliz. c. 4; 8 Geo. 1, c. 15, s. 16*.—Lands, the possession of which has been delivered by the sheriff to a judgment debtor under an elegit, cannot be extended under another elegit (subject to the prior extent), whether at the suit of the same or another creditor. *Carter v. Hughes*, 6 Week. Rep. 212.

EXECUTION.—*Defendant in custody for twelve months for damages under £20*—*Ejectment*.—Prior to the Common Law Procedure Act, the 15 & 16 Vic. c. 76, the effect of 48 Geo. 3, c. 123, was, that after judgment in ejectment, the party taken in execution might be discharged after twelve months. That was settled by *Doe v. Sinclair* (5 Dowl. 615; *Doe v. Ward*, 2 Mees. and W. 65). In the following case it was decided that a defendant in an action of ejectment taken in execution for the costs, is entitled, notwithstanding the C. L. P. Act, 1852, under which damages in ejectment are not entered up in the judgment, to be discharged from custody pursuant to 48 Geo. 3, c. 123, after being in custody for twelve months. *Humphries v. Franks*, 30 Law Tim. Rep. 287.

HABEAS CORPUS.—*Suit by prisoner*—*Prosecuting action*—*Examination as witness*.—A prisoner for debt is entitled to a writ of *habeas corpus ad testificandum* in his own case; but he is not entitled

to a *habeas corpus* for the purpose of prosecuting his suit. *Exp. Cobbett*, 6 Week. Rep. 282.

INTERROGATORIES.—*C. L. P. Act, 1854, s. 51*.—*What interrogatories granted*.—*Some unreasonable, rejected altogether*.—When a plaintiff or defendant applies to exhibit interrogatories, those interrogatories should be reasonable and proper with reference to the suit; if they are not, the court or a judge at chambers will not go through them to peruse and settle them for the parties, but refuse them altogether. *Robson v. Crawley*, 30 Law Tim. Rep. 290.

JUDGE'S ORDER.—*Service of rule*.—*Making order a rule of court*.—A judge's order, under the garnishee clauses of the *C. L. P. Act*, calling upon defendant to attend before the master to be examined touching any debts which may be due to him, was served on the defendant's father at defendant's "usual" place of business, the plaintiff being unable to discover the defendant's place of abode. On motion to make the judge's order a rule of court, a rule was granted absolute in the first instance. *Bird v. Wretton*, 30 Law Tim. Rep. 258.

DIVORCE AND PROBATE.

DESERTION.—*Protection order*.—*Specific property*.—A protection order as to the property of a wife who has been deserted by her husband should be framed in general terms, and not to cover specific property. *Re Mullineaux*, 6 Week. Rep. 356.

DISSOLUTION OF MARRIAGE.—*Heading of petition*.—*Demurrer*.—A petition for dissolution of marriage should be addressed to the court for divorce and matrimonial causes. A demurrer to a plea for insufficiency not allowed. *Re Evans*, 6 W. Rep. 356.

DIVORCE.—*English marriage*.—*Scotch divorce*.—*Bona-fide domicile*.—Where a party goes from England to Scotland without any intention of permanently residing there, or even giving up his establishment in England, a Scotch sentence of divorce dissolving an English marriage contracted between a domiciled Englishman and woman is invalid (*Lolly's Case*, Russ. and R. C. C. 234; *Beasley v. Beasley*, 3 Hagg. 639). Accordingly, in the New Divorce Court an allegation pleading as the ground for the validity of a Scotch sentence of divorce, a mere temporary residence, and no *bona fide* domicile in Scotland—rejected as not being sufficient to distinguish the case from *Lolly's case*, and *Beasley v. Beasley*. A Scotch sentence purports to dissolve the marriage, and if not good for that, cannot authorise any separation short of total divorce. *Robins, v. Paxton*, 30 Law Tim. Rep. 371.

JUDICIAL SEPARATION.—*Alimony pendente lite*.—*Mode of trial*.—The 17th section of the Divorce Act gives the new court power to make orders for

alimony; the 32nd section gives power, on a petition for dissolution to decree alimony *pendente lite*; the 6th section transferred to the new court all the authority in matrimonial matters formerly exercised by the ecclesiastical courts; and sec. 9, gives the Judge Ordinary all the power and authority of the court, except as to the matters thereby specially reserved for the full court. It seems doubtful under the act and rules whether the judge ordinary can make an order for alimony *pendente lite* in a suit for judicial separation, especially where the husband has not appeared to the citation (rule 25): where one party does not appear, the judge ordinary will not require a jury on the trial of a suit for separation, but the evidence will be oral. *Re Deane*, 30 Law Tim. Rep. 370.

LIMITED ADMINISTRATION.—*Practice*.—*Administration for a special purpose*.—*Terms of years*.—Administration will be granted to a person interested in a term of years created for trust purposes, but the administration will be limited to the trust term alone. *Re Rynes*, 30 Law Tim. Rep. 353.

LUNACY.—*Will*.—*Testamentary incapacity*.—*Administration*.—In *re Bourget* (1 Curt. 591) Sir H. Jenner granted administration of a deceased person as dying intestate, being satisfied from affidavits, and upon the face of the will, that the deceased was insane. This decision was acted on in the following case. E. R. J. made a will whilst of unsound mind in favour of some charitable institution. The only party interested to support it was cited to propound it, or show cause why it should be treated as a nullity, but did not appear. On an affidavit of the medical attendant of the deceased of his testamentary incapacity, administration was granted to one of his next of kin as in an intestacy. *Terry v. Dyke*, 6 Week. Rep. 275.

REVOCATION OF WILL.—*Effect of destroying revoking document*.—*First will not set up*.—The destruction of a second will itself revoking one of prior date does not reinstate the first will, though the document may be in existence at the testator's death—parol evidence admitted as to the contents of the second will. *Exp. Brown*, 30 Law Tim. Rep. 353.

REVOCATION OF WILL.—*Custody of testator*.—*Signatures and attestations torn off*.—A. made his will, being in extreme illness, on 15th December, and placed it in his mother's custody. At his request his mother gave it to him on the 21st. On 22nd he died, and the will was found under the bolster of the bed with signatures and attestation clause torn off, the latter were nowhere to be found. Deceased had expressed no dissatisfaction with his said will. On motion for probate of the paper, to his widow as executrix: Held, that the will was revoked. *Exp. Lewis*, 30 Law Tim. Rep. 353.

WILL.—Wife—Husband—Separation by consent—Separate property.—The following is a decision of some importance as to the right of a married woman to dispose of property earned by her after her separation from her husband, on the ground that it is to be considered as her separate property, with all its incidents. A and B. married in 1811; in 1817, they verbally agreed to separate, and not to interfere with each other, and divide their then furniture and effects. The wife supported herself by her own industry, and acquired property which she disposed of by will in 1866. Probate of this will was opposed by the husband, who asserted his marital right to his wife's property: Held, that, under the circumstances, the property had been acquired to the wife's sole and separate use, and that the *jus disponendi* would attach, as a matter of course, to such property. *Haddon v. Fladgate*, 30 Law Tim. Rep. 370.

BANKRUPTCY.

ARREST.—Privilege of a prosecutor and a witness from arrest for debt while attending police courts—Vesting order upon creditor's petition vacated without his consent.—Where a party is in attendance at a police-court as a prosecutor and witness, and is arrested for debt, the judges of the superior courts will discharge him; and where a vesting order has been obtained by the arresting creditor upon a creditor's petition under the 1 & 2 Vic. c. 110, s. 36, upon such process: Held, that it will be vacated without the consent of the creditor, as being void *ab initio*. *Re Harrison*, 30 Law Tim. Rep. 371.

ATTENDING ASSIGNEES.—Bankruptcy Consolidation Act, 1849, s. 105 — Bankrupt's services after certificate — Allowance for.—By the 105th section of the Bankruptcy Consolidation Act, 1849, it is enacted "that, every bankrupt, after he shall have obtained his certificate, shall, upon demand in writing given to him, attend the assignees to settle any accounts between his estate and any debtor to or creditor thereof, or do any act necessary for getting in or protecting the said estate, for which attendance he shall be paid five shillings per day by the official assignee out of his estate." Where it is admitted that the bankrupt, after having obtained his certificate, has attended frequently at the office of the official assignee and assisted in getting in and realising his estate, but no account has been kept of the number of such attendances, the court will approve of such sum being paid to him under the 105th section of the Bankruptcy Act, 1849, as the official assignee shall certify that in his judgment he is entitled to. *Re Barnes*, 30 Law Tim. Rep. 356.

COLLUSION.—No assets—Bankruptcy Act, 1854, sect. 20—Certificate wholly refused.—By sec. 20 of the Bankruptcy Act of 1854 (17 & 18 Vic. c. 119),

it is enacted, "that on and after the first day of September, 1854, any trader liable to become bankrupt may petition for adjudication of bankruptcy against himself; but unless he shall forthwith, after filing his petition and before adjudication of bankruptcy thereunder, make it appear to the satisfaction of the court that his available estate is sufficient to produce the sum of £150 at the least, his petition shall be dismissed." In the following case, the appellant having been adjudged bankrupt, the commissioner wholly refused him any certificate, considering that he had himself instigated the bankruptcy, though not himself the petitioner for adjudication, at a time when his debts were very large, and his assets below the amount fixed by the 20th section of the act 17 & 18 Vic. c. 119: Held, by Knight Bruce, L. J. (agreeing with that decision), that the bankruptcy was virtually the bankrupt's own act, and that this fact, coupled with the amount of assets, brought the case within the section referred to, and that the certificate was properly refused. *Turner L. J.*, did not concur in this judgment, not being convinced that the bankruptcy had been instigated by the bankrupt himself. Time was given to the bankrupt to apply to have the bankruptcy superseded. *Exp. Sellers*, 30 Law Tim. Rep. 343.

COUNTY COURT PROCESS.—Arrest after protection granted in respect of contempt of court committed prior to such grant.—In *Exp. Wilson* (30 Law Tim. Rep. 138), a person who had obtained an interim order of protection was arrested on a county court warrant of an earlier date, ordering him to be committed for not appearing pursuant to a summons, was held not entitled to be discharged by the Insolvent Debtors Court, because such commitment was to be regarded as a commitment for contempt, no sufficient excuse being alleged for non-appearance thereto. This decision has been supported in the following case, where it appeared that J. W. being summoned to appear at a county court upon a judgment summons, and not appearing, was ordered to be committed for such non-appearance. J. W. subsequently files his petition under the protection acts, and obtains a protecting order which, however, he does not obtain from his attorney. He is then taken by the bailiff of the county court notwithstanding the information orally given to the officer that he had obtained a protecting order, although he had not the order then in his possession. J. W. applies to the court for his discharge, showing both by his protection order and the schedule that he was duly entitled to protection from process: Held, that the court will not interfere. *Re John Whitfield*, 30 Law Tim. Rep. 371.

FURNITURE OF BANKRUPT.—17 & 18 Vic. c. 119, s. 26—Staying sale of bankrupt's furniture—

Delay—Terms imposed by the court.—By sect. 26 of the 17 & 18 Vic. c. 119, it is enacted that except where the court shall otherwise order, an inventory and valuation of the remainder of the bankrupt's household furniture, tools, and implements of trade shall be made and delivered to the official assignee; and where the bankrupt shall by writing under his hand request the assignees not to dispose of the same, such household furniture, tools, or implements of trade shall be disposed of by the assignees without the previous order of the commissioner; and the commissioner may, upon the application of the bankrupt, postpone the removal and sale of the same for such time as he in the exercise of his discretion shall think fit, having regard to the probable value of the other property of the bankrupt; and he may permit and suffer the same to remain in the use and occupation of the bankrupt upon such terms and conditions as to the commissioner may seem proper, so as to protect the same from being made liable to or sold for the payment of any rent, rates, or taxes which might become due thereafter, for or on account of any house or premises wherein such property may be placed; and of any debt, claim, or demand whatsoever, by reason of being in the possession and occupation of the bankrupt. By sect. 27, if the other estate and effects of the bankrupt shall, in the due administration thereof, pay to the creditors such an amount of dividend as shall entitle him to an allowance in money, and the household furniture, tools, and implements of trade so contained in the last-mentioned inventory and valuation shall not have been sold, the bankrupt shall accept the same at the valuation so originally put upon them, or a sufficient portion thereof, to be selected by him with the approbation of the assignees, as and for his allowance, instead of money. Where a bankrupt neglects to give notice to the assignees under the above 26th section, not to dispose of his household furniture, &c., and he claims to remain in the use and occupation thereof, subject to such conditions, &c., as the commissioner may think proper until the day before that upon which they are advertised to be sold, the commissioner will not stay the sale unless the bankrupt will undertake to pay to the official assignee the costs incurred by the assignees in respect of such sale and the postponement thereof. *Re Tredinnick*, 30 Law Tim. Rep. 355.

OPPOSITION.—Creditors debt not due—Bill of exchange—Proof of debt.—A bill of exchange, although not arrived at maturity, is sufficient proof of debt to allow of the opposition of a creditor; but the opposing party must, in this case, come in with the general body of creditors, and he will be precluded from taking any subsequent proceedings

against the insolvent. *Re Davies*, 30 Law Tim. Rep. 353.

PROOF.—Shareholders of a bankrupt banking firm—Right of proof against, by creditor of the bank—Joint and separate creditors.—A, was a shareholder in a banking company which was itself bankrupt, and obtained his certificate. A creditor of the bank having obtained the requisite order for execution against A., tendered a proof against his estate for the amount of his debt, but it was admitted as a claim only, and the dividend payable thereon was ordered to be reserved. Upon motion by the assignees of A. to expunge the claim: Held, that it was proveable under the bankruptcy, but that no dividend should be paid thereon, until all the separate creditors of A. had been paid in full. *Exp. Hill*, 30 Law Tim. Rep. 372.

PROOF.—Joint and several promissory note—Subsequent alteration—A new signature, though upon the face of the note, only amounts to an indorsement.—It is well established that a material alteration made in a bill, note, or other document, after its execution, will invalidate it, unless made with the consent of all the parties, and then a fresh stamp is requisite; but this does not apply to the case of a party signing his name under those of the original makers, as he is looked on as an indorser. In the following case, a joint and several promissory note was made by three persons as a security for a sum of money, lent to one of them, and interest. Some years afterwards the holder was about to call in his money, but upon the maker's procuring another party as an additional security, he allowed it to continue outstanding. The signature of this new party was not indorsed on the note, but was written on the face of it, as though it were the name of one of the original makers, but with the date when it was written. On the subsequent bankruptcy of one of the original makers of the note: Held (reversing the decision of the Commissioner), that the additional signature operated as an indorsement, and did not invalidate the note, and, consequently, that the debt was proveable under the bankruptcy. *Exp. Yates, Re Smith*, 30 Law Tim. Rep. 282.

REMAND.—Detainer by creditor after the discharge of insolvent at expiration of period of remand.—The 85th section of the 1 & 2 Vic. c. 110 takes the case of a remanded insolvent out of the operation of that act. Therefore, where an adverse adjudication is made at the suit of a creditor who has not lodged a detainer against the insolvent to detain the insolvent, the creditor, without any writ of summons being sued out, or application made to a judge under the third section of the act, may immediately have office copy of the adjudication certified, and then he may proceed to detain (or arrest, if discharged) the re-

manded insolvent, as in a case of mesne process by affidavit of debt in the old style, before the passing of the 1 & 2 Vic. c. 110, abolishing arrest on mesne process in 1838, but at the expiration of the period of remand named by the court, the insolvent is entitled to be discharged, and the discharge will be made absolute in the first instance and without payment to the arresting creditor of the costs of the proceeding to detain upon the adverse adjudication. *Re Jennings*, 30 Law Tim. Rep. 353.

SUPERSEDEAS.—*Collusion—No assets—Creditor not proved opposing certificate.*—A creditor who has not proved cannot oppose the allowance of the bankrupt's certificate, but he may be examined as a witness by the assignees for the information of the court. Where the same party was solicitor for the bankrupts and immediately before the bankruptcy defended actions for them and was also petitioning creditor and creditors' assignee, and there is not a shilling of assets for distribution amongst the creditors, the court will dismiss the petition and supersede the bankruptcy. *Re Hahn and Freystadt*, 30 Law Tim. Rep. 371.

TRADER - DEBTOR SUMMONS.—*Action pending, and pleas of fraud, &c—Adjournment of bankruptcy proceedings.*—Where actions are commenced, and pending such actions a trader-debtor summons is taken out for the same debts, and the defendant has obtained leave to plead to such actions on the ground that the whole transaction was a fraud upon him, the court will adjourn the question of bond or no bond until after trial of the actions. *Re A Trader-debtor summons*, 30 Law Tim. Rep. 356.

VOLUNTARY WINDING-UP.—*Joint-stock company—Winding-up voluntarily—Petition by creditor—Adjournment.*—Where the creditors generally agree that a company shall be wound up voluntarily, and special resolutions to that effect have been made by the shareholders, this court will adjourn a petition presented by a dissentient creditor for winding-up the company for a reasonable time to enable the arrangements for a voluntary winding-up to be carried into effect. *Ex parte The Governor and Company of the Bank of Scotland, Re The Australian Steam Clipper Company (Limited)*, 30 Law Tim. Rep. 354.

WINDING-UP.—*Joint-stock company—Jurisdiction—Unlimited liability company.*—The Court of Bankruptcy has no jurisdiction under the Joint-Stock Companies Acts, 1856 and 1857, to entertain a petition to wind up a company registered as unlimited; and if such a petition be presented to that court, it will be dismissed with costs. *Copper Mining Company*, 30 Law Tim. Rep. 354.

COUNTY COURTS.

INTERPLEADER.—*Appeal.*—By s. 68 of the 19 & 20 Vic. c. 108, it is enacted, that "an appeal from the decision of a county court on the same grounds, and subject to the same conditions as are provided by the 14th section of the act of the 18 & 14 Vic. c. 61, shall be allowed in all actions of replevin where the amount of rent or damage exceeds £20, and in all actions for the recovery of tenements where the yearly rent or value of the premises exceeds £20, and in proceedings in interpleader where the money claimed, or the value of the goods or chattels claimed, or of the proceeds thereof, exceed £20, and in all actions where the parties agree that the court shall have jurisdiction." It has been decided that where the amount claimed is under £20, yet if the value of the goods or chattels seized, or of the proceeds thereof, exceeds £20, the parties have a right of appeal from the decision of a county court judge in proceedings in interpleader. *Vallance v. Nash*, 30 Law Tim. Rep. 261.

JURISDICTION.—*Metropolis [ante, p. 238]—Concurrent jurisdiction of superior courts—9 & 10 Vic. c. 95, s. 128—19 & 20 Vic. c. 108, s. 18, set out ante, p. 238.*—Where the plaintiff carries on business in the district of one, and the defendant dwells or carries on business in that of another of the metropolitan county courts, but the plaintiff dwells more than twenty miles from the defendant, the plaintiff has the option of suing in the superior courts, under the 9 & 10 Vic. c. 95, s. 128, notwithstanding the 18th section of the 19 & 20 Vic. c. 108. *Waterlow v. Dobson*, 27 Law Journ. Q. B. 55.

REFERENCE TO JUDGE.—*Under C. L. P. Act, 1854—Refusal to act—Rule to compel him—Rescission of order of reference.*—Under s. 3 of the C. L. P. Act, 1854, the court, where it is shown that the matter in dispute in any action in the superior courts consists wholly or in part of matters of mere account, which cannot be conveniently tried in the ordinary way, may, in country causes, order the same to be referred to a county court judge. An order was made under the above provisions of the act referring an action to a county court judge; the judge refused to act, and the court refused to rescind the order, but granted a rule in the nature of a mandamus under 19 & 20 Vic. c. 108, s. 43. *Cummins v. Birkett*, 30 Law Tim. Rep. 260.

CRIMINAL LAW.

BASTARDY ORDER.—*Application within twelve months of birth of child—Summons beyond that time.*—The 7 & 8 Vic. c. 101, s. 2, provides, that a woman may make application within twelve months of the birth of a child to have it affiliated on the putative father, and that the magistrate may "thereupon"

issue a summons; and the 8 Vic. c. 10, gives the form of the summons, which begins, "Whereas application has been this day made to me." The mother of a bastard child, within twelve months after its birth, applied for a summons against the alleged father, but he having absconded, and she being ignorant where he had gone to, the magistrate did not then issue a summons, but told her to apply again as soon as she ascertained where he was living. After the expiration of the twelve months, having learned that he was working at his trade in a neighbouring county, she renewed her application, and a summons referring to the original application was issued by the same magistrate: Held, that the summons was regular and in proper time, and that an order of affiliation made upon it was good. *Potts v. Cambridge*, 6 Week. Rep. 214.

CUSTOMS.—*Information under Customs Acts*—*Nolle prosequi*—*Misjoinder of counts*—*Judgment against some only of several defendants*.—An information for offences under the Customs Acts in unshipping, and assisting to unship, uncustomed goods was filed against several defendants after 16 & 17 Vic. c. 107, came into operation, the offence having been committed before that time. All the defendants were found guilty; but the crown subsequently entered a *nolle prosequi* upon all counts except one which charged the offence against eight defendants, and upon that count entered up judgment against six of the defendants for treble the value of the goods, the judgment being entered against each severally: Held, that the judgment must be sustained, that it was competent to the Attorney-General to enter the *nolle prosequi*, that the acquittal of two did not operate as a discharge of all; that unshipping and assisting meant one offence, and that it was no objection that the judgment was for treble value against each of the six defendants severally. *Attorney-General v. Ruck*, 6 Week. Rep. 283.

FALSE PRETENCES.—*Indictment*—*Evidence*.—An indictment alleged that the prisoner falsely pretended to the prosecutrix (among other false pretences) that she kept a shop at A., and that the prosecutrix might go and live with her there until she got a situation, and that by means of the false pretences the prisoner obtained from the prosecutrix 10s. The making of the false pretences was proved, and the evidence showed that the prisoner did not keep a shop at A., but failed to negative the other false pretences. The jury found specially that the prisoner was guilty of fraudulently obtaining the 10s., and that the prosecutrix parted with it under the belief that the prisoner kept a shop at A. and that the prosecutrix should have it when she went home with her: Held, that the indictment was good, and that the conviction was supported by the

evidence and the finding of the jury. *The Queen v. Fry*, 27 L. J. M. C. 68.

GAME.—*Conviction*—1 & 2 Will. 4, c. 32, s. 30—*Invalid adjudication*—*Jurisdiction of justices*—*Bona fide claim of right*.—A conviction under the Game Act, 1 & 2 Will. 4, c. 32, s. 30, included four persons, and adjudged each of them to forfeit and pay the sum of £2 each, &c., and if the said sums be not paid, that each of them, the said C., B., W., and S. so making default, should be imprisoned for one month, unless the said several sums, and the costs and charges of conveying each of them, the said C., B., W., and S., so making default, to the said gaol, shall be sooner paid: Held, that the conviction made each defendant liable to be imprisoned until he had paid the penalty and the expense of conveying, not only himself, but the other persons convicted, and was, therefore, bad, and that this was not a case in which to exercise the power of amendment under the 12 & 13 Vic. c. 45, s. 7. On the hearing of the information, the defendants *bona fide* claimed a right to enter upon the land under an authority from S., who was alleged to be the owner of the land, and asked for an adjournment, as they were not then prepared with evidence, which was refused. *Semble*, that this was such a *bona fide* claim of right as put an end to the jurisdiction of the justices. *The Queen v. Cridland*, 27 L. J. M. C. 28.

LARCENY BY BAILEE.—*Recommendation to mercy no part of verdict*—*Intention permanently to deprive owner*.—The cases of *Reg. v. Holloway* (1 Den. 730), and *Reg. v. Poole* (6 Week. Rep. 65), show that the offence of larceny is not complete unless the intention is to deprive the owner of the entire dominion, and dispossess him permanently. The prisoner having opened a plate chest, of which he was bailee for safe custody, and pawned the contents, was tried for the simple larceny. The jury found him guilty, but recommended him to mercy, "believing that he intended ultimately to return the property:" Held, that the conviction must be sustained; for upon the facts there was evidence of larceny, and it does not appear from the recommendation to mercy, which is no part of the verdict, that the jury believed that the prisoner, at the precise time when he took the property, intended to return it. *Reg. v. Trebilcock*, 6 Week. Rep. 281.

METROPOLITAN BUILDING ACT, 1855.—18 & 19 Vic. c. 122, s. 6—*Building employed for her Majesty's service*—*London Militia Depot*.—A building intended to be the depot for the arms, &c., of the London Militia (which are the property of the Crown), belonging to, and erected by, the Commissioners of Lieutenancy for London under the Militia Acts, and paid for pursuant to those acts by the trophy tax, is exempt from the operation of the

Metropolitan Building Act, 1855, by the 6th section, as a "building employed in her Majesty's service." *Ja. v. Hammon*, 27 L. J. M. C. 25.

METROPOLITAN BUILDING ACT.—*Conviction for non-payment of surveyor's fees*—*Railway arch converted into a stable*.—One of the arches of a railway viaduct was converted into a stable by building a wall at each end, with doors, and constructing a loft within the arches. The stable was let by the railway company to a tenant: Held, that this stable, if otherwise a building within the provisions of the Metropolitan Building Act, was within the exception in the 6th clause, of buildings used for the purpose of a railway. *North Kent Railway Company v. Bagger*, 30 Law Tim. Rep. 285.

METROPOLIS LOCAL MANAGEMENT ACT.—*Order of vestry*—*Precept of board*—*Rate in respect of a separate sewer's district*.—A rate made upon a particular part of a parish for expenses of the Board of Works in execution of the act 18 & 19 Vic. c. 20, need not recite the precept from the Metropolitan Board of Works to the vestry by whom the order to levy the rate is made. Such order to levy is good if directed to the overseers, although there are no overseers for the parish. Such rate is good although it is issued by persons who do not sign as guardians; and although the declaration at the end of the rate is signed by some of the guardians not being all the same as those who made the rate. *Christie v. The Guardians of Saint Luke's Chelsea*, 6 Week. Rep. 333.

PAUPER.—*Removal*—*Evidence*—*Effect of former order unappealed against*.—On the trial of an appeal against an order of removal from A. to B., the respondent parish relied upon a former order of removal, whereby the pauper when six weeks old, had been removed to B., together with her mother: Held, that the description of the pauper in that order as "the daughter of C.," who was then removed, did not estop the appellant parish from disputing her legitimacy, as her illegitimacy would have afforded no ground of appeal against the former order. *Reg. v. The Inhabitants of Caerways*, 30 Law Tim. Rep. 256.

PILOTS.—*Merchant Shipping Act, 1854*—*Refusal of pilot to deliver up licence*—*Authority of pilotage board under sec. 352*.—Under sec. 352 of the Merchant Shipping Act, 1854, the pilotage authority, by whom the pilot is appointed, has an absolute power, without assigning any cause, to require him to produce or deliver up his licence, and a refusal to comply renders him liable to a penalty not exceeding £10. *Reg. v. Henry*, 30 Law Tim. Rep. 256.

POOR RATE.—*Floating pier*—*Rateability*.—In the case of *Reg. v. Morrison* (1 Ell. and Bl. 150), the Court of Queen's Bench held that a floating

dock was not rateable, because it had no fixed locality, was actually shifting about from place to place, and might be used for the purpose for which it was constructed, at one place as well as another, as a piece of moveable machinery. But the same court in the following case held that a floating pier on the River Thames, which rose and fell with the tide, was kept in its place by an iron chain attached to an iron post affixed to the stairs which were the landing-place, and by iron chain-cables fastened to anchors placed in the bed of the river, was rateable to the poor rate. *Reg. v. Forrest*, 30 Law Tim. Rep. 284.

QUARTER SESSIONS.—*Costs*—*Taxation of, after sessions ended*—*Irregularity of*.—Order for costs by quarter sessions must be taxed and completed before the sessions ended. Where a court of quarter sessions has confirmed a rate with costs, the taxation of such costs, after the end of the sessions, is irregular, and an order for the payment of such taxed costs cannot be enforced. *Reg. v. Budden*, 6 Week. Rep. 213.

QUARTER SESSIONS.—*Appeal to quarter sessions*—*Power to award costs where appeal dismissed for want of jurisdiction*.—As a general rule, if a court has no cognisance of a matter brought before it, and simply on that ground dismisses the matter, there is no power to award costs. But this rule has been broken in upon as to sessions by the 12 & 13 Vic. c. 45 (called Baines' Act), for by sec. 5 it is provided that the court before which any appeal is brought may, if it thinks fit, order the party against whom the same is decided to pay costs. Accordingly, in the following case, the Court of Queen's Bench has decided, that, under the 12 & 13 Vic. c. 45, s. 5, the Court of Quarter Sessions has power to award costs, upon an appeal being brought before them, although the court has in fact no jurisdiction to hear the case upon its merits, and the appeal is dismissed on that ground. *Reg. v. Packwick*, 30 Law Tim. Rep. 255.

QUO WARRANTO.—*Clerk to justices of the peace*—*5 & 6 Will. 4, c. 76, s. 102*.—Where an office is held during pleasure, a *quo warranto* will not lie. In *Exp. Sandys* (4 B. and Adol. 863), it was said that "a clerk to justices has no legal hold upon his office: he is only appointed to assist the justices; it is an office during pleasure." This decision was followed in the case about to be mentioned where it was decided; first, that the affidavits on which a rule *nisi* is granted are sufficient, if they show substantially, though they do not state specifically, at whose instance the motion is made as relator (*Reg. M. T. 1839*). Secondly, that a *quo warranto* does not lie against the clerk of the peace of the county, to oust him from his office. Thirdly, that

a clerk to justices employed or interested in the prosecution of offenders committed for trial by the justice, does not, *ipso facto*, forfeit his office, but remains in it until removed by the justices. *Reg. v. Fox*, 80 Law Tim. Rep. 285.

SESSIONS.—*Certiorari*—*Appeal from special case, though certiorari taken away*—*Municipal Act—Construction under bye-law*.—By consent of the parties, appellant and respondent, a special case may be stated by a court of quarter sessions for the opinion of the Court of Queen's Bench, though the writ of certiorari be taken away. But the questions submitted must be questions of substance arising upon the merits of the case; and a question of jurisdiction may conveniently be raised in this way. So held, on a special case in which the question was, whether, upon the facts stated, a certain projection in front of a house for the purpose of a shop was an obstruction rendering the owner of the house liable to a penalty under a bye-law made under the Municipal Act, 5 & 6 Will. 4, c. 76. *The Queen v. Dickenson*, 27 Law Journ. Q. B. 34.

SLAUGHTERING CATTLE.—*Conviction for slaughtering cattle elsewhere than at a public slaughter-house*—*Local Improvement Act—Markets Clauses Act—Slaughtering for private use*.—Under the Local Improvement Act, following closely the words of the Markets and Fairs Clauses Act, it is no offence to slaughter cattle elsewhere than in a public slaughter-house, unless there be the intention to sell the carcase as human food. *Ellas v. Nightingale*, 80 Law Tim. Rep. 285.

TOLLS.—*Turnpike roads*—3 Geo. 4, c. 126, s. 82; 14 & 15 Vic. c. 38, s. 4—*Exemption from toll for implements of husbandry*—*Steam engine used for a thrashing machine exempt*.—By the 32nd section of 3 Geo. 4, c. 126, no toll is to be taken on any turnpike road for any horse or carriage employed in carrying or conveying any ploughs, harrows, or implements of husbandry. In consequence of doubt as to what was included in these last words, it was declared by section 4 of 14 & 15 Vic. c. 38, that the words implements of husbandry in the act of 3 Geo. 4 should be deemed to include thrashing machines. It has been decided that horses employed in conveying a steam engine which is intended to be used as the motive power of a thrashing machine are exempt from toll on a turnpike road, by virtue of 3 Geo. 4, c. 126, s. 82, and 14 & 15 Vic. c. 38, s. 4. *Reg. v. Matty*, 6 W. Rep. 213; 27 L. J. M. C. 59.

REAL PROPERTY AMENDMENT ACTS.

Sales through medium of Court of Chancery—English Encumbered Estates Act—Registration of

titles—*Parliamentary titles*—*Powers of leasing*—*Powers and authorities in mortgages*.—There can be no doubt that the profession must be prepared to have thrust upon it some scheme for cheapening the transfer of property. Both Lords and Commons are agreed upon that disagreeable point; but fortunately there is so much disagreement on the particular mode of carrying out the project, that there is some hopes that the voice of the profession may be heard, and have some influence in directing—though it cannot entirely ward off—the blow. With this object it is desirable that it should be known what are the views of our legislators, and we, therefore, furnish a short statement by Lord Cranworth of the purport of two bills which he has introduced into the Lords, and which have been referred to a committee. And by way of showing the dissidence of opinion, we append some remarks by Lord St. Leonards, showing that whilst he does not object to changes, he has his own pet projects in store for the profession. Lord Cranworth said that legislation with the view to which his measure was founded—to facilitate the transfer of land—took its rise in 1846, when a committee was appointed to inquire into the burdens that affected real property. That committee reported that the value of land was much diminished by the cost of transfer; and in consequence of that report a commission, of which the late Lord Langdale, Mr. Walpole, Mr. B. Ker, Mr. Coulson, and others were members, was issued. They recommended a *registration of assurances*; but although the report was made in 1850, nothing was done until 1853, when he (Lord Cranworth) introduced a measure, founded on the report, which passed through their lordships' house, but was not equally successful in the other House of Parliament. The select committee to which it was there referred recommended that a commission should be issued to inquire into the subject of the *registration of titles* rather than of assurances. A commission was accordingly issued, in January, 1854, of which Mr. Walpole, the present Home Minister, was a member. The report was made in the May of last year, and it recommended an elaborate system of registration, converting the whole system of holding real property into a system analogous to that of shares in a railway, and establishing offices at which land could be transferred in a manner very closely assimilated to the transfer of stock. He was of opinion, however, that this scheme was *neither practicable nor expedient*. And he therefore felt it his duty to see whether he could not devise some other means for attaining partially, at any rate, the object in view. He had prepared the present bill and the Tenants for Life and Trustees Bill. The great evil of the present system of the tenure of land was the expense attendant upon

its sale or mortgage. The evil manifested itself in the elaborate and complicated and expensive inquiries into the title of the vendor or mortgagor *on each occasion when an estate was to be dealt with*. This expense being borne by the purchaser, he naturally allowed for it in the purchase money; he gave so much less for the land, the value of which was proportionately diminished. If this was done *once for all* it might be tolerable; but it was repeated on each occasion on which the property was dealt with. He proposed to remedy this evil by rendering it unnecessary to inquire into title for a very long period after it had been once investigated. He would effect this by allowing a person who wished to sell his land to do so through the *medium of a court of justice*, which should investigate his title, and, in the event of its being found good, should *give a title good against all the world* and equal in all respects to the parliamentary title which was given in Ireland under the Encumbered Estates Act. The only question as to the propriety of doing this was whether it could be done without danger to the interests of third persons who were not before the court. He believed that it might, with a danger so infinitesimally small, that the risk might well be run. He should propose that any person wishing to sell his land might present a petition to the *Court of Chancery*, praying that it might be sold through the medium of the court. The purchaser would take his money into court, and then the title would be investigated by the officers of the court in the same way in which titles were now investigated on sales under the authority of the court. It might be said that the purchaser would not be active to find out faults in the previous title when he knew that the Court of Chancery was going to give an indefeasible one; but for his own part he did not see why the result of an investigation by one of the conveyancing counsel of the Court of Chancery, who were bound for the sake of their professional reputation to exercise the utmost vigilance, should not be as satisfactory as it was at present. He believed that, under the present system, not one error in the question of title had occurred within the last twenty years. But in order to obtain even still greater security, he proposed that advertisements should be inserted in the newspapers published near the place where the land was to be sold, giving notice of the intended sale. Parties having adverse claims should then be allowed to come in and appeal against the sale, and should have their costs, if the court decided that they had a reasonable cause to come in. Moreover, it should be in the power of the Lord Chancellor and other judges of the court to frame rules for obtaining the greatest possible security, one of which should be that on any sale the vendor and

his solicitor should make an affidavit that so far as as they knew every deed was disclosed, and that they did not know of anything affecting the title which they had not disclosed. If that were taken in connection with the bill of his noble and learned friend opposite, by which it was proposed to make it a misdemeanor to conceal deeds affecting property about to be sold, he should think they would arrive at security as nearly as possible. He had been told by *auctioneers* that if land could be sold *without the cost of investigating the title*, and freed from any doubts as to the validity of the title, *two years' purchase would thereby be added to its value*. He would consent to the measure being referred to a select committee. Whilst he was on his legs, he would take the opportunity of explaining the provisions of his second bill—that of Tenants for Life, Trustees, &c., Bill. What he was going to say in respect to this latter measure was by no means germane to the former one. Independently of the importance of giving a parliamentary title, he thought that there ought to be some system introduced whereby the necessity of those *unnecessary and prolix matters usually inserted in a conveyance might be avoided*. It had been often attempted to effect this object by giving forms of conveyances; but those attempts had heretofore failed. What he proposed was this, that whereas now there were many *unnecessary clauses introduced into an ordinary conveyance*, that thenceforward those clauses need not be inserted, by simply making the power which they were meant to confer incidents of law to the purchase of estates. In marriage settlements the estate was sometimes so settled that a person called a *tenant for life* had until a few years ago no *power to lease*, except for his own life. In a bill which he had the honour of introducing, and which had become law—namely, the Settled Estates Bill, a power was given to all tenants for life to lease the estate for twenty-one years upon the ordinary conditions of security. He now proposed to extend that principle in this bill. In all settled estates, where the deeds were properly drawn, there was not only this power given, but also, if the parties wished to avoid the necessity of coming into the Court of Chancery, the tenant for life had power to lease the estate on building leases. He now proposed to make this power incident to the estate of every tenant for life, unless the deed of settlement creating tenancies for life specially excluded it. He did not wish to introduce any incident as to sale, as he thought they should proceed cautiously in that direction. Although he did not propose to do that, nevertheless, if the settlement should give the party power to sell or exchange, he proposed that all the concomitants of that power might be considered as incident to the persons possessing such power.

With regard to *mortgages* such deeds were generally of a complicated character, and contained a great many powers. He proposed that those powers generally should be viewed as mere incidents to the estate of a mortgagee.

Lord St. Leonards said that their lordships no doubt felt indebted to the noble and learned lord for the trouble he had taken upon this subject with the view to the attainment of an object which they all had in view—that object being one to furnish facilities for the transfer of land while rigidly protecting all the rights of property. The question, however, to be considered was, whether the measure was calculated to attain that object, and whether it would establish a tribunal that would give a warranty of title. The bills of his noble and learned friend appeared to have been framed on the principle of the Encumbered Estates Court Act for Ireland. But the Encumbered Estates Court Act for Ireland was intended to meet a totally different state of things. That court was established in consequence of the difficulties arising from the manner in which the estates in Ireland were generally encumbered. The measure under the circumstances was, therefore, a most wise one, and had a most beneficial effect. In England, however, no such difficulties existed. The only object that was really required was the establishment of an independent court to give a warranty of title. Now, whatever was the expense, whatever were the obstacles which they were daily endeavouring to remove, nevertheless there was no real difficulty in this country in regard to the sale and purchase of property. The question now for consideration was whether an *exparte* tribunal could be safely established for the purpose of giving a warranty of title. His noble and learned friend proposed to throw all this extra business upon the Court of Chancery. He told him that the moment his bill came into action the Court of Chancery would be paralysed, and its powers in a great measure annulled by the overwhelming pressure of business that would be put upon it. The whole of the machinery for which they had gone to such expense and trouble in 1852 would be thus destroyed. He (Lord St. Leonards) submitted it would be impossible for the judges to give more time to chamber business than they did at present. The other evening when he proposed a measure upon this subject he had many difficulties to encounter. In that measure he proposed to give a period of 20 years within which to limit the power of a party to substantiate his title. His noble and learned friend, however, became alarmed at such a limitation being too short; but what did he himself do by the present bill? Why, the party would not have 20 years nor 20 days to maintain his title,

because the moment this bill passed his right would be then excluded. Under this bill the title to the estate would be settled at the moment. There should be appointed competent judges to sit as a tribunal for the establishment of titles. That tribunal should be independent. He was not disposed to offer any opposition to the second reading of this bill. At the same time, he should be sorry to see it passed into a law in its present shape.

THE LATE LAW APPOINTMENTS.

LORD CHELMSFORD, AND SIR FITZROY KELLY.

The recent appointments of Sir Frederick Thesiger, now Lord Chelmsford, as Lord Chancellor, in the room of Lord Cranworth, and Sir Fitzroy Kelly as Attorney-General, in the room of Sir Richard Bethell, have brought these personages into such prominent positions, that notices of their careers will be acceptable to our readers.

Sir Frederick Thesiger, now Lord Chelmsford, was born in London in the year 1794, his father being Mr. Charles Thesiger, a gentleman holding an official position in the Island of St. Vincent; his uncle, Sir Frederick Thesiger, was *aide-de-camp* to Lord Nelson at the Battle of Copenhagen. Young Thesiger also commenced life on the sea—serving as midshipman on board the *Cambrian*. In this ship he saw some active service, and, among other affairs, assisted at the bombardment of Copenhagen in 1807.

Up to this time Sir Frederick's prospects in life were exceedingly promising. His father had amassed considerable property in the island of St. Vincent, and on the demise of the elder members of his family Sir Frederick was looked upon as the successor. But before he could establish himself in this position, the eruption of the Suffrier Mountain took place (May, 1812), and destroyed every acre of the family property. The British Parliament voted £25,000 for the relief of the sufferers. This was a great boon to the poorer inhabitants, but it did not mitigate the loss of the Thesigers. Their estate was completely swallowed up. The young midshipman now saw that he was thrown upon his own resources, and finding but little chance of advancement in the naval profession, he gave up his appointment in the *Cambrian*.

Acting upon the advice of his friends, rather than upon the bent of his own inclination, he determined to study for the legal profession; and after going through the ordinary course of probation, was called to the bar at Gray's Inn in 1818. Twenty years of practice gained a first-rate position, and he now made an effort to secure a seat in Parliament.

In the month of February, 1840, the late Lord

Truro (then Sir Thomas Wilde) was promoted to the office of Solicitor-General. This event caused a vacancy in the representation of Newark, and although Sir Thomas demanded a re-election, Sir Frederick Thesiger was induced to put himself forward as a candidate in the Conservative interest. The polling showed the advantages of the two parties to be pretty nearly equal, for Sir Thomas Wilde only succeeded by a majority of nine. In a month afterwards, the "pocket borough" of Woodstock was placed at Sir Frederick's service. Of course the opportunity was eagerly seized. His opening speech was against the policy of Lord Palmerston respecting the Chinese war. A short time after, he had a disagreeable duty to perform in defending Sir James Graham against the indignation which greeted the discovery of the practice of opening and detaining certain letters in the Post-office.

He spoke in most of the debates between 1840 and 1844, and joined the late Sir Robert Peel on his change of policy respecting the corn laws. In the latter year, Sir Frederick was appointed Solicitor-General, and his acceptance of office cost him his seat for Woodstock. He stood no chance of being re-elected, as the Marquis of Blandford (the Duke of Marlborough's son) was in want of the place. Thanks to the self-denial of Mr. Duffield, the then Member for Abingdon, who resigned in favour of the new Solicitor-General, he was enabled to resume his seat in the House of Commons. Two years after, the death of Sir William Follett gave an opportunity for further advancement, and Sir Frederick was made Attorney-General. He did not, however, hold the situation long, as the Ministry of his friend and patron, Sir Robert Peel, came to an end in July, 1846. Had it lasted only a few days longer, Sir Frederick Thesiger would have been elevated to the bench. The Chief Justiceship of the Court of Common Pleas became vacant, and according to precedent, the learned gentleman, as Attorney-General, would have been selected for promotion. As it was, the luck of the appointment fell to Sir Thomas Wilde.

When the general election of 1852 occurred, Sir Frederick relinquished his seat for Abingdon, and was returned for the borough of Stamford. In this year too, the learned advocate was re-appointed to the office of Attorney-General, and he continued its functions until the fall of Lord Derby's Government in the month of December following.

Among his brethren of the law, Lord Chelmsford is not considered a weighty authority, although he was acknowledged to be a brilliant advocate, and to possess uncommon tact in the business of his profession.

Not one lawyer in a hundred conquers a first-rate

position in the House of Commons as a speaker, and Sir Frederick Thesiger was no exception to the rule. Of course he spoke clearly, without boggling or hesitation, and with perfect ease. And, moreover, he had the advantage of a tall, handsome person, and all the weight which a high position at the bar, status in society, and political reputation could give him; but still he was not an effective speaker. Indeed, he could hardly hold the House together, and seldom, if ever, elicited applause. The House was always decorous and quiet when he spoke. Nobody ever thought of showing signs of impatience, and much less would anyone think of groaning him down, or of uttering even the faintest "Oh, oh," but yet members would stroll out of the House, and however full it might be when Sir Frederick arose, it was sure to get thinner and thinner as he went on, in apparently the most mysterious manner. The cause we believe was that there was some absence of earnestness in Sir Frederick's speeches, that it was impossible to feel that he cared the value of a straw for the cause that he was advocating, even if he believed in it; and when this is the case, it is impossible that any speaker can produce an impression upon his audience. *Si vis me flere flebis.* No man can expect to move an audience unless he show by earnestness of manner that he is anxious to do so. Sir Frederick was not a very diligent attendant at the House. His legal duties were too absorbing to allow him to be a zealous member of Parliament. With the House he was a general favorite. He is affable and pleasant in his manner, enjoys a joke, and has himself uttered some good things in his day. We have said that Sir Frederick has the advantage of a fine person. Considering he has the weight of sixty-four years upon his shoulders, he is perhaps the finest man in the House. He is at least six feet high, erect as a maypole, and walks and looks like a middle-aged man.

"Thesiger's last" has always been a quotable joke amongst lawyers. Here is his very last: When asked what title he would choose on being made Lord Chancellor, he is reported to have said: "Well, I have so often missed the peerage by an ace, that I think they ought to call me Baron *Luck-now*?" One of his very best jokes was made after a judicial dinner at Mr. Justice Talfourd's, when, as the guests were searching for their hats, some one asked him, "Thesiger, is this your Castor?" and he replied, "No, it's Pollock's (Pollux)."

Sir Fitzroy Kelly, member for East Suffolk was born in 1796. His father was Captain Robert Hawke Kelly, an officer in the army, and his grandfather, one Colonel Kelly, who distinguished himself in the East Indies. Sir Fitzroy entered as a student of Lincoln's Inn, in 1818, and was called to the bar

six years afterwards. Having established himself as a sound lawyer, he became anxious for parliamentary honours, and began by submitting to a defeat at Hythe in 1830. In 1832 he sought the suffrages of the people of Ipswich, with a similar result. Another application to the electors of Ipswich in 1835 was more fortunate. He was duly elected; took his seat in the House of Commons, and forthwith joined in the debates of that assembly. But in the meantime a petition was got up to unseat the new member, on charges of bribery and corruption. The discussion of the case created an unusual amount of interest, partly on account of the extraordinary revelations which were made during its progress, and partly on account of the position of the parties implicated. The result was that Sir Fitzroy was unseated.

Sir Fitzroy Kelly suffered severely from these transactions, and his professional advancement was doubtless retarded in consequence. However, in the year 1837 he again contested the borough of Ipswich, and was declared by the returning officer to be in a minority of *two*. Doubting the accuracy of the return, the learned gentleman appealed to the House of Commons; an investigation was accorded, and eventually the seat was declared to belong to him by the overwhelming majority of *one*. His opponent of course retired, and Sir Fitzroy Kelly had the happiness of taking the oaths and his seat. Here he remained until 1841, when Parliament was dissolved. He once more solicited the confidence of the Ipswich electors, but had the mortification of being rejected. He remained out of Parliament until 1843, when he was elected for the borough of Cambridge. The general election of 1852 witnessed yet another change, for Sir Fitzroy had the good fortune to be elected both for Harwich and for East Suffolk. Being in a position to choose, he exercised his privilege by selecting East Suffolk. Sir Fitzroy Kelly was its representative during the Derby Government, and was again chosen in April, 1857.

All this while Sir F. Kelly continued his indefatigable professional labours, and earned for himself a splendid practice and an enviable position. He secured the appointment of Standing Counsel to the Bank of England, and served a short time as Solicitor-General to the Government of the late Sir Robert Peel. As an advocate Sir Fitzroy Kelly holds the highest rank in his profession. His caution, allied with an extraordinary quickness of perception, make him a most "safe" man as counsel.

Sir Fitzroy Kelly used to be a most impassioned speaker. Well do we remember him deliver a fervid harangue against the game laws, in a court upon the Norfolk Circuit, forty years ago, which

moved the audience immensely, disturbed even the gravity of the bench, and what is more, gained the acquittal of four prisoners. But forty years have told upon Sir Fitzroy, and perhaps the deadening influence of pleading at the bar has had as much effect as age. Sir Fitzroy is no longer fervid, but tedious, dull, and wearisome, especially when he comes down, as his habit is, after midnight, to push forward some favourite measure, or to offer opposition to some bill which is not a favourite. Half-an-hour have we seen Sir Fitzroy upon his legs between one and two in the morning, when all that he said might have been said more effectively in ten minutes. He is now Attorney-General. As such we trust that no legal reform bill (matters which generally come on after midnight) will be laid upon the table this session, or many a weary hour shall we be kept out of our beds. Sir Fitzroy is noted for his late hours. He will come down to the House at five or six, go to dinner at seven, and "return from dinner" at midnight; and then he takes no note of time, neither of his own nor other members'. He is doubtless a first-rate lawyer, but no debater.

THE NEW SCALE OF ALLOWANCE TO PROSECUTORS AND WITNESSES.

Very much dissatisfaction has been—and very justly—expressed at the recently issued scale of allowance to prosecutors and witnesses in criminal cases, and some sort of a promise has been held out by the new Home Secretary, that a revision of the allowances shall be made with a view to making them more in accord with the claims of prosecutors and witnesses. In the meantime, the scale lately issued will, of course, be acted on, and we, therefore, present the following short abstract of the amounts to be paid in future to prosecutors and witnesses:—

Before magistrates: constables paid by salary, for attending for a distance under seven miles per day, 1s. per day; for a greater distance, 1s. 6d. per day, for each night, if necessarily detained, 2s.; mileage, whether paid by salary or not, parliamentary fare; if not enabled to travel under the 7 & 8 Vic. c. 85, second class fare; otherwise than by rail, per mile after the first (4d.), 2d. per mile. Exceptions: Attending on police duty, except on special certificate, nil. Attending from a distance under three miles, nil. Professional witnesses, giving professional evidence, in the profession of the law or medicine, attending from a place under two miles, 10s. 6d. per day; if beyond that distance, per day, £1 1s. For mileage, per mile each way, 5d. All other witnesses, if resident within two miles of a magistrate, per day, 1s.; if above two miles, 1s. 6d.

per day. If detained more than four hours, although residing within two miles, 1s. 6d. per day; if detained more than six hours, 2s. 6d.; for each night necessarily detained, 2s. 6d.; mileage, otherwise than by rail, per mile, 8d.; by rail, second class. Exceptions: no mileage if resident within two miles of magistrates. Allowances at the assizes and quarter sessions—Professional witnesses attending professionally, per day, £1 1s.; per night 2s. 6d.; mileage, per mile, 8d. Constables paid by salary, attending from a distance under two miles, 1s. per day; above that distance, 1s. 6d. per day; per night, 2s.; mileage, parliamentary fare, if not entitled to travel at that rate, second class fare; if otherwise than by rail, for each mile beyond four, 2d. Exceptions: chief constables and superintendents attending from a distance of more than three miles, to be paid as ordinary witnesses. All other witnesses, per day, 3s. 6d.; per night, 2s. 6d.; at sessions, 2s.; mileage by rail, second class; otherwise than by rail, per mile, 8d. Governors of gaols or officers on duty in court for evidence of previous convictions, 3s. 6d. per day; governors for bringing prisoners under habeas to give evidence, 12s. per day; officers for the same duty, 6s. per day; mileage, per mile each way, 1s.; attorneys for giving evidence, if saving the attendance of another witness, over their allowance as attorney, 6s. 8d. per day.

THE SLAVE TRADE.

COMMISSION COURTS—VICE-ADMIRALTY COURTS.

The two blue books on the slave-trade, annually presented to Parliament, have been issued. Apart from the special interest attaching to them as records of what has been done from the 1st of April, 1856, to the 31st of March, 1857, towards suppressing a traffic the proposed resumption of which has lately occupied no small share of public attention, they suggest considerations of some importance. It may be useful to premise that the correspondence included under Class A embraces the reports of the Commissioners of the Mixed Commission and the Vice-Admiralty Courts, and of the naval officers engaged in the operations of the cruising squadron. Class B is composed of the despatches of the British ministers and agents in foreign countries, and of communications with foreign ministers in England. It will thus be seen that the diplomatic machinery employed for this purpose is threefold. We have first the regularly appointed ambassadors or consuls; secondly, the judges and arbitrators, who constitute the Mixed Commission Courts; and thirdly, the Vice-Admiralty Courts; and it is not a little perplexing to the uninitiated to comprehend the precise

functions of each. To solve this problem we will first address ourselves.

The systematic efforts of Great Britain for the suppression of the slave trade date from 1815, when, at the Congress of Vienna, the extinction of the traffic in slaves was incorporated as a principle of the future policy of the European powers. Since that period treaties for this special object have been concluded with the whole of them, as well as with the United States and the Governments of South America; and conventions have been added to give force to those entered into with Spain and Portugal. In virtue of these we have a Mixed Commission Court at Havana, with an English judge and a Spanish judge, and an English commissioner and a Spanish commissioner of arbitration, in all four officials, who, in the event of a difference of opinion, draw lots which shall decide the case in dispute. At Sierra Leone sit the commissioners of the British and Netherlands, British and Spanish, British and Argentine, British and Uruguayan, British and Bolivian, and British and Chilean mixed Courts. That of the Cape of Good Hope may be regarded as a court of convenience, before which the cases of vessels captured to the east of the Cape are brought in obvious preference to taking them to the one at Havana. The seat of the British and Portuguese mixed courts is Loando. There used to be others at the Cape de Verdes and Jamaica, but they were abolished in 1851, in accordance with an understanding to that effect at a conference held at Lisbon on the 18th of September in that year. The office of the commissioners in these courts is confined to an adjudication of vessels taken on the high seas by the cruisers of the contracting powers, specially provided with instructions and authority for that purpose. The Vice-Admiralty courts, which may be regarded as the police courts of the high seas, have only a limited jurisdiction. It extends, by virtue of certain acts of Parliament, to vessels sailing under the Brazilian, or under no particular flag, or under that of any power not under treaty with Great Britain to abolish the slave trade, and which may be captured by her Majesty's cruisers on any part of the high seas, on suspicion of being engaged therein. They are established at Sierra Leone and St. Helena.

THE MONTH'S SUMMARY.

County court appeal—Interpleader issue—Value—19 & 20 Vic. c. 108, s. 68.—Sec. 68 of the 19 & 20 Vic. c. 108 (3 L. C. 69—80), enacts, "that an appeal from the decision of a county court on the same grounds, and subject to the same conditions as

provided by the 14th section of the act of the 13th and 14th year of the reign of her present Majesty, shall be allowed . . . in proceedings in interpleader where the money or the value of the goods or chattels claimed, or the proceeds thereof, exceeds £20." It has been decided by the Court of Exchequer that an appeal lies under 19 & 20 Vic. c. 108, s. 68, from the decision of a county court judge on an interpleader issue if the value of goods seized exceeds £20, although the debt for which they are taken be less than £20. *Vallance v. Nash*, 6 Week. Rep. 227.

Metropolis Local Management Act. — Rate for expenses of the Metropolitan Board — Precept to vestry — Order of vestry on overseers — Form of rate. — A precept was issued by the Metropolitan Board of Works to a vestry to pay a sum of money charged upon a district of the parish, for defraying the expenses of the board in the execution of the Local Management Act (18 & 19 Vic. c. 120). The vestry made an order accordingly directed to "the overseers of the parish;" but by a local act, the guardians of the poor performed the office of overseers. The guardians accordingly made a rate but did not recite in the heading or any part of it, the precept to the vestry but merely stated the object and purpose of the rate. It was signed by guardians, but it was not under seal, nor did the parties signing it, state that they signed as guardians: Held, that the rate was valid in point of form. *Christie v. The Guardians of St. Luke's Chelsea*, 30 Law Tim. Rep. 366.

Accommodation bills.—The revelations resulting from several recent extensive failures have disclosed the prevalence of a system of business utterly inimical to the interest of commercial policy. The system is one which, if allowed to continue unchecked by legislation, threatens to inflict still more disastrous effects upon commerce. It is the system of accommodation bills of exchange. The object of a bill of exchange is simply to represent value received. Its becoming due at a future time is intended to afford time to the acceptor to effect a sale, and thus to enable him to take up his acceptance at maturity, after his conversion at a fair profit of the goods received. It is plain, therefore, that such a document, purporting in express terms to be given "for value received," when the acceptor has in fact received nothing of the kind, is a moral fraud upon any *bonâ fide* holder who may have taken the bill in the ordinary way of business, from an intermediate indorser for actual value. If the name of the indorsers be multiplied, as often happens, when none but the last has affixed his signature for valuable consideration, the fraud is so much the greater, and approaches the legal definition of conspiracy.

Nevertheless, a large proportion of bills in circulation is well known to have been given for accommodation only. Sets of speculators draw bills one upon the other for mutual convenience; and such is the eagerness of traders, that these bills are readily received in payment for large consignments of goods, perhaps in many cases not so much even for the sake of the fair mercantile profit as for the high rate of discount demanded. The bills are for a time met as they become due, although the goods may have been disposed of at a sum less than the cost price. The funds are provided by means of other bills, given upon the same system. Occasionally perhaps by some lucky speculation a profit may be realised sufficient to protract the impending and inevitable crash somewhat beyond the period at which it might reasonably have been anticipated. Possibly some of the parties can contrive to make the game outlast their own lives. When the day of failure comes (and any increase in the rate of discount tends materially to hasten it), firm after firm in the whole circle falls like one of a row of card-houses. Then it is discovered that A., whose modest villa at Brixton, dingy office in the city, and staff of servants and clerks, could not have cost him more than £800 a-year altogether, fails for fifty times that amount of debt incurred in five years; and that B., commission agent, whose personal expenses afforded only a garret in one of the City lanes and a sleeping-room in Pimlico, owes half-a-million. The amount of debt has been represented in good hard merchandise given by some one or other, and utterly sacrificed so far as honest trading is concerned. A. and B., therefore, it will be seen, are institutions somewhat expensive to the mercantile community. They are nevertheless to be reached only through the Bankruptcy Court, which is another institution of a somewhat kindred nature, so far as its expensiveness is concerned. Creditors frequently prefer to submit to the first loss, and say no more of the matter. But instead of taking warning, they endeavour to repair their losses by other speculations, perhaps also by doing a little more, at a higher rate, in the discount line, and extend their own credits by taking an example from the manner in which they have been swindled. Others, victimised in their turn, fall into the same system, and thus the infection spreads and gains ground by its very defeats.

The Earldom of Shrewsbury.—We believe we may state that the further consideration of this great case will take place in the Committee of Privileges of the House of Lords immediately after Easter. It will be recollected that it stands adjourned from August last, in order that the evidence which had been then laid before the House might be properly digested. In the interval, both the noble claimant (Earl Talbot)

and his opponents have been busily engaged in prosecuting further inquiries in search of additional evidence "pro and con." It is difficult to believe, after the character of the evidence adduced last session, that there can have been any discovered which can militate against Lord Talbot's case; far more probable is it that the result of the further researches has been to strengthen it. But upon this point all is mere conjecture beyond the sphere of the professional men concerned, who very properly keep their own counsel in the matter. Meanwhile the position of the tenants who hold out against the threats of the devisees of the late Earl (who, it will be recollected, have got possession of the greater part of the estates), is anything but a pleasant one. It is clearly not the game of the devisees to distrain; the result of such a step would be to put them to proof of their title, a proof which can only be substantiated if there is not an Earl of Shrewsbury. They have not, therefore, as we believe, dared to distrain on a single tenant; nevertheless, threats which cost nothing have been pretty plainly bestowed, and have, of course, had their effect upon the fears of some, and upon the ignorance of others, of the tenants. We hear that at Alton, the family seat in Staffordshire, a tenant farmer's house was taken forcible possession of by the agent of the devisees under the protection of a "posse comitatus;" that the tenant, very properly, forcibly ejected the parties left in possession; that the tenant then brought an action of trespass against the agent of the devisees, and got £10 damages; that the devisees then indicted him, with others who helped him to turn the intruders out, at the last assizes for Stafford, for a riot, and that the bill was thrown out by the grand jury. The devisees did not win laurels, nor have they much cause to rejoice at their ill-advised harsh treatment of this tenant. Surely this is not the way in which a great question of title to property can be or should be tried? Such a line of conduct can only bring the parties following it into disrepute.

—*Shropshire Conservative*, March 20.

Power of counsel to bind client by entering into arrangements—Mr. Swinfen's case—Swinfen v. Swinfen [See 3 L. C. pp. 158, 271].—This case, which has been repeatedly before the courts in connection with the trial which took place at Stafford, and involved an important question as to how far counsel could bind their clients by arrangement, came before the Lords Justices on the 25th of March, on appeal from a decision of the Master of the Rolls, dismissing a bill filed by the plaintiff, Captain Swinfen, praying a decree for a specific performance of an agreement entered into at the trial by the counsel for the defendant, Mrs. Swinfen, by which she was to convey all the estates to which she was entitled, subject

to an annuity for life. This compromise, it will be recollected, took place between Sir F. Thesiger, now the Lord Chancellor (Lord Chelmsford), and Sir Alexander Cockburn, now Lord Chief Justice of the Common Pleas, and their junior counsel, but the arrangement was positively disavowed and repudiated by the lady and her solicitor, Mr. Simpson, but it was then too late, the jury having been discharged. Proceedings were taken in the Court of Common Pleas to enforce the arrangement, first to set it aside, and second by attachment, but failed, as also the present suit (3 L. C. 158, 271). The case was fully argued on the part of the appellant, the plaintiff in the suit, before the Lords Justices, who intimated to Mr. Kennedy, Mrs. Swinfen's counsel, that he would not be troubled, as their minds were quite made up, and they were prepared to give judgment. They were of opinion that the compromise at Stafford having been entered into without Mrs. Swinfen's authority, she was not legally bound by it; at all events, a court of equity would not specifically enforce it, unless she had varied her position by her subsequent conduct, which she had not. The appeal would therefore be dismissed with costs.

W. Wingfield Baker, Esq.—The chapel-bell of Lincoln's-inn, as is usual on the death of a bencher, was tolled on the 23rd of March for a short time, in consequence of the death of the above gentleman, who died at Sherborne Castle, Dorsetshire, on the Sunday preceding, at the advanced age of eighty-seven. The learned gentleman practised for many years as Mr. Wingfield. He obtained the rank of King's counsel, and was made one of the Masters in Chancery. The late Lord Chancellor Cottenham married his daughter. He had long retired from the profession, and on his accession to some property had taken the name of Baker. The learned gentleman was as remarkable for his affable demeanor and polished manners as for his acute understanding, closeness of reasoning, and thorough knowledge of his profession. Until a very recent period the fresh and cheerful countenance of the retired master was frequently seen in Lincoln's-inn, where he was quickly recognised by "troops of friends." Although advancing towards the age of ninety, he occasionally revisited Lincoln's-inn Hall, where for years he had argued before Lord Eldon, to whose decisions—sure, though slow—none more frequently did homage than Lord Cottenham, the son-in-law of the deceased gentleman. So rapid are the changes caused by party politics, that not less than eight different lawyers have filled the Chancellor's chair during this gentleman's career—namely, Lords Eldon, Lyndhurst, Brougham, Cottenham, Truro, St. Leonard's, Cranworth, and Chelmsford.

Days of grace in cases of insurance.—The decision with respect to days of grace in connection with life assurance policies has been very widely canvassed, and the question will deserve the serious consideration of all the offices, with the view of arriving in future at some uniform practice, to relieve the anxiety which the public will naturally feel now that a high legal opinion has been expressed upon the point. It is satisfactory to notice that some of these associations have already announced their intention to regard all claims arising within the days of grace in the same manner as if the premium had been absolutely paid. The distrust occasioned by this decision will, it is feared, be universal; and there can be no doubt the same rule applies with equal force to policies of insurance against fire, and all persons who do not pay the renewal premium on or before the respective quarter days upon which the insurance becomes due are running their own risk, and the offices are not legally liable, in the event of loss or damage occasioned by fire, within the usual fifteen days, the renewal premium being unpaid.

A corporation taken in execution.—Lord Thurlow used to say that a corporation had neither a body to be kicked nor a soul to be lost; but it would seem that it possesses the agreeable power of being taken in execution. If a *ca. sa.* does not operate against a municipal body a *fi. fa.* does. The Queen can send a bum-bailiff into the sacred habitation of the Queen's representatives, and a London judge can sign a warrant against the corporate property of the minor luminaries of the law who sit on a city bench!

"'Tis strange, 'tis pity; pity 'tis 'tis true."

Recently a sheriff's officer took possession in the Queen's name of all the goods and chattels of the corporation of Chatham, under a distress warrant. This startling event owes its origin to the exigencies of the town clerk, whose little bill amounts to £1869 19s. 1½d., to which may now be added £80 for the expenses of the execution, making altogether a total of not far from £2000, to be paid before the dire necessity of stripping the Guildhall and all that therein is can be averted. So little was this event expected that the Mayor had just departed from his chair, which he filled yesterday with great credit at the meeting, and had little idea that before he next took his seat on the bench of justice there might be no seat left for him by the inflexible exigencies of the law; but that the sheriff's officer would have—not unwarrantably—taken his seat. What would old Richard Watts say, that enemy of "rogues and proctors?" Why, even his picture will not be spared any more than that of Sir Stafford Fairborn, and the other worthies who adorn the hall.

The Inclosure Commission.—The annual report of the Inclosure Commission of their proceedings

during the past year has just been issued. The total number of applications to the commissioner for enclosures since the passing of the act has been 767, of which 37 were made during the past year; 401 of these applications were confirmed, 86 were otherwise disposed of, and 280 are still in progress. The total applications for exchanges have been 1444, of which 272 were made during last year; 1124 exchanges were confirmed, 145 were otherwise disposed of, and 175 are still in progress. Fifty-six applications for partition have been made, 7 of which were made during last year; 39 of the applications for partitions were confirmed, 6 otherwise disposed of, and 11 still in progress. Fourteen applications have been made to the commissioners for the division of mixed land, none of them during last year; 12 of the applications were granted, 1 was otherwise disposed of, and 1 is still in progress. Sixteen applications have been made to the commissioners to define lost boundaries, 2 of them during last year; 11 such definitions were made, 8 applications otherwise disposed of, and 2 are still in progress. Eight applications were made to the commissioners to apply money received under the Lands Clauses Consolidation Acts to railway acts, of which 1 was made last year. Of these 7 applications were confirmed, and 1 remains still in progress. Four applications have been made to apportion fixed rents, during last year, of which 3 were confirmed by the commissioners, and 1 was otherwise disposed of. The total number of cases brought under the notice of the commissioners since the passing of the act, was 2,029, of which 322 were made last year. In conformity with such applications, the commissioners have confirmed the enclosure of 226,010 acres of land, and the enclosure of 262,418 acres more is at present in progress. The total number of acres to the enclosure of which the commissioners consented last year was 7,994, of which 4,210 acres were in one enclosure in the county of York. Four enclosures in the county of Oxford amounted to 354 acres; three in the county of Wilts, amounting to 885 acres; two in the county of Sussex, amounting to 274 acres; five in Hereford of 373 acres, one in the county of Southampton of 481 acres, one in the county of Monmouth of 246 acres, one in Essex of 84 acres, one in Cornwall of 67 acres, one in Carmarthen of 61 acres, one in Northampton of 61 acres, one in Devon of 48 acres. The average expense as far as the commissioners are concerned, for each enclosure is £16 12s. 2d.

The Copyhold Commission.—The sixteenth annual report of the Copyhold Commissioners has just been issued, from which it appears that the total number of enfranchisements and commutations decided by the commissioners last year were 308, of this 52 were

clerical, 21 collegiate, and 230 lay. The total consideration paid in all the cases was £55,879 17s. 6½d. in money, and £50 14s. in rent-charges. Since the establishment of the commission in 1841, 1,388 cases have been decided of enfranchisement and commutation, of which 539 were clerical, 100 collegiate, and 749 lay. The total consideration paid in all the cases was £305,133 16s. 2½d. in money, and £3012 17s. 1d. in rent-charges, and 1,223 acres of land. The number of cases coming before the commission has steadily increased in each year, those of last year being 92 more than in 1856.

The Tithe Commission.—The report of the Tithe Commissioners for the past year has just been printed by order of the House of Commons. Since the establishment of the commission, 7,070 agreements had been received by the commissioners, of which they had confirmed 6,778, 290 having been superseded by awards, leaving actually in progress 2. The total number of notices issued for making awards was 7,089, of which 2 were issued during the year 1857; 5,632 drafts of compulsory awards had been received, of which 5,431 had been confirmed, of which 6 had been received, and 10 confirmed during 1857. Thus it will appear, from the above statement, that the tithes have been commuted by confirmed agreement, or confirmed awards in 12,209 districts. In 398 of these districts the rent-charges have been disposed of by redemption or merger, 1 of which was confirmed in 1857. The total number of apportionments received was 11,769, of which 11,763 were confirmed, 171 having been reserved and 167 confirmed during last year; 719 applications for the exchange of glebe lands, of which 666 were confirmed. Of these 41 applications were reserved, and 41 confirmed in 1857. Thus, at the close of last year, the commissioners had confirmed 44,173 distinct mergers of tithe or rent charges.

NOTICES OF NEW BOOKS.

Outlines of Equity, being a Series of Elementary Lectures delivered at the request of the Incorporated Law Society. By FREEMAN OLIVER HAYNES, of Lincoln's-inn, Barrister-at-Law, and late Fellow of Caius College, Cambridge: 10s. Cambridge: Macmillan and Co.

The present work is the re-production in print of a course of Elementary Lectures on Equity recently delivered by the author at the request of the Incorporated Law Society. As might be supposed from this account of the origin of the work, it is one of an elementary character, and, accordingly, the author himself (under the modest guise of its being the suggestion of friends) conceives it may be useful to gentlemen reading in barristers' chambers, and to

articled clerks, and, in addition, to university undergraduates who have selected law as part of their curriculum, and interesting to educated laymen of maturer years. It may be easily conceived, that a work composed with a view to suit such different classes of readers must have a considerable variety of matter disposed in various ways—from the merely interesting, and, therefore, elementary to the more practical, and, therefore, profound matter. It will readily be understood that no little skill is requisite in order to properly adjust the proportions of the merely elementary and of the more profound; so that, on the one hand, the layman may not be repelled by too much obtruseness, and the professional disappointed by too much mere elementary matter. Mr. Haynes appears to have nicely adjusted the due proportions, and thus to have produced a work which may be truly said to have exactly fulfilled the objects proposed: a rather rare occurrence—performance generally falling far short of intentions.

In many respects the subjects of equity jurisdiction have in themselves a higher degree of interest in an historical point of view than have those of purely legal jurisdiction; for there is first of all the struggle to found an equity jurisdiction to some extent—to get in the thin end of the wedge—then to extend that jurisdiction still further, and afterwards to view it in full operation as a regularly recognised head of equitable jurisdiction. Mr. Haynes has wisely considered equity jurisdiction in these lights, and has thus produced, not only a useful, but also an interesting volume. He divides his matter into separate heads, and treats of them in nine chapters or lectures, with an appendix. The following is a summary of these heads: Sec. I. General Nature and Extent of Equity Jurisprudence—Classification of the various heads of Equity; Sec. II. General History and Constitution of the Courts by which Equity Jurisprudence is administered; Sec. III. General Outline of a Suit in Equity; Sec. IV. Brief Review of the principal heads of Equity Jurisprudence where the Courts exercise an Exclusive Jurisdiction; Sec. V. Brief Review of the principal heads of Equity Jurisprudence where the courts exercise a Concurrent Jurisdiction; Sec. VI. Brief Review of the principal heads of Equity Jurisprudence where the Courts exercise an Auxiliary Jurisdiction; Sec. VII. The Wife's separate Estate considered as a particular head of Exclusive Jurisdiction; Sec. VIII. Of Account considered as a head of Concurrent Jurisdiction; Sec. IX. Of Injunction in case where the Court exercises an Auxiliary Jurisdiction; Appendix A., *Appilgarth v. Sergeantson*; B., *Hoigges v. Harry*; C., *Dodd v. Browning*; D., *Ordinance of 8 Edward I.*; E., *Observations on the relative Advantages and Disadvantages of the procedures at*

Law and in Equity; F., Form of Assignment of Dower by the Heir.

It is somewhat difficult to select any particular portions for extract, as the work presents so many; but we think the following will serve to give readers a good notion both of the general contents and mode of treatment. Speaking of the history of the growth and development of equity jurisdiction, Mr. Haynes says:—

"It is by no means, as not unfrequently supposed, that of a gradual slow encroachment. On the contrary, turning to the earliest records, we see, at first, the Chancellors trying apparently to redress every grievance of whatever nature, which would otherwise be remediless; while the labours of the more recent judges consisted, not merely in developing heads of equity already founded, but in pruning the luxuriance of the earlier jurisdiction.

"In illustration of this position, let me turn to the book which I now take up, and which contains the most authentic information we possess respecting the early proceedings in Chancery. It is the first volume, 'Calendars in Chancery of Queen Elizabeth,' printed by order of the Record Commissioners. Prefixed to the Calendars is contained a selection of bills and petitions, of dates anterior to Queen Elizabeth's reign, accompanied, in the later instances, by the answers, replications, and depositions of the witnesses. The general character of these early proceedings is in the preface to the publication thus described: 'Most of these ancient petitions appear to have been presented in consequence of assaults and trespasses, and a variety of outrages which were cognisable at common law, but for which the party complaining was unable to obtain redress, in consequence of the maintenance and protection afforded to his adversary by some powerful baron, or by the sheriff, or by some officer of the county in which they occurred.' I need hardly observe to the youngest beginner amongst you, that any such cause for coming into equity has long since ceased to exist; and even if any such in fact existed, it would clearly, at the present day, constitute no ground for equitable interposition.

"The latitude of jurisdiction assumed by the early Chancellors will, however, be best known by the selection of a few instances from the book before me. The following cases were then read:—1stly, p. xx.—*Kymburley v. Goldsmith*. A common case of action for non-delivery of wood. 2ndly, p. xli.—*Appilgarth, widow, v. Sergeantson*. Bill complaining that defendant, having obtained a sum of money of plaintiff giving her to understand he intended to marry her, has married another woman, and refuses to return the money. See this case, Appendix A. 3rdly, p. xxiv.—*Henry Hoigges v. John Harry*. Bill by plaintiff, an attorney, to restrain the defendant, a priest, from practising witchcraft against him. See this case, Appendix B. The two first cases obviously present no ground for equitable interposition. The third, viewing witchcraft as a reality, was in substance a bill for protection against a criminal outrage, a species of suit wholly inadmissible at the present day.

"But, in truth, we find considerable inaccuracy of opinion, respecting the true functions of equity, prevailing at a much later date than that of these precedents. Thus, the celebrated confidential adviser of Henry the Seventh, Archbishop Morton, appears, according to a report in the Year-Books, to have denied even the distinction between 'technical equity' and 'equity in the sense of natural justice.' The report of the case, which is noticed by both Mr. Spence and Lord Campbell, is rather curious. It appears that one of two executors, colluding with a debtor to the testator's estate, had released the debtor. The co-executor filed a bill against the executor and the debtor. The Chancellor was disposed to give relief. Fineux, counsel for the defendant, observes, 'that there is the law of the land for many things—and that many things are tried in Chancery which are not remediable at common law; and some are merely matter of conscience between a man and his confessor,' thus pointing out accurately the distinctions between law, equity, and religion. But the Chancellor retorts: 'Sir, I know that every law is, or ought to be, according to the law of God' (ignoring thus altogether any distinction between law and religion); and then, merging completely the Chancellor in the Archbishop, he continues: 'and the law of God is, that an executor, who is evilly disposed, shall not waste all the goods, &c. And I know well, that if he do so, and do not make amends if he have the power, *il sera damné* in hell.' And then the Chancellor proceeds to lay down some rather unsound law. But I would recommend those of my hearers who would wish clearly to understand and appreciate how the wave of Chancery jurisdiction first swelled and threatened to advance beyond due bounds, and then gradually receded, to read carefully that portion of Mr. Spence's work which treats of the now obsolete jurisdiction of the Court of Chancery. I am not aware that the subject has been systematically considered elsewhere.

"If, then, it be historically true that our present equity jurisdiction is only the ultimate result of the development of principles varying in different centuries, it must obviously be impossible to convey any satisfactory view of equity which does not, in substance, amount to an enumeration of the particular heads of jurisprudence gradually evolved by the labours of our successive Chancellors.

"But some faint general notion of the functions and limits of equity may perhaps be conveyed by enunciating, and elucidating by example, a few of the leading maxims or principles of equity. I will select four—three of an enabling, and the fourth of a restrictive character.

"1. No wrong without a remedy.

"2. Equity regards the substance or spirit, and not the letter merely.

"3. Equity acts 'in personam.'

"4. Equity follows the law.

"1. No wrong without a remedy. This is the chief root of our equity jurisdiction. You have already seen the over-luxuriance of the earlier shoots which sprang from it. The only limit, indeed, to its creative power is the barrier interposed between itself and that portion of natural justice which, as already indicated, falls within the

province of morals and religion only. To this maxim, for instance, we owe our vast system of uses and trusts. You are probably aware that, previously to the earliest records in the book before me (the earliest are of the date of Richard the Second), a practice had grown up (under circumstances which time does not permit me to detail) of the legal owners of lands conveying them to third parties, who undertook to hold them for certain uses. The common law courts steadfastly refused to recognise in any way the engagements entered into by those (feoffees to uses, as they were called) to whom the land had been so conveyed. The Chancellors, on the other hand, held that engagements were binding on the consciences of the feoffees to uses, and that they (the feoffees) were compellable in equity to perform them. Thus was the foundation laid of the great system of trusts, which, by itself, constitutes the larger portion of the entirety of equity jurisdiction.

"This was, perhaps, the boldest application of the maxim that the history of our equity jurisprudence tells of; and, as might be expected, it was one of early date. Let me read to you from the volume before me one of the earliest published instances of a resort to equity which falls under this head of jurisdiction.

"2. Equity regards the spirit, and not the letter.

"The popular belief, that the law exacts a literal fulfilment of contracts, has ever been deeply rooted. We trace it distinctly in the drama and in works of fiction. Perhaps one of the most remarkable instances is that of Shylock's bond. The penalty of the bond was, as you recollect,—

"A pound of flesh, to be by him cut off
Nearest the merchant's heart."

The money not being paid on the very day, the Jew claims the penalty. Double the amount lent is offered; but, being tendered after the appointed time, it comes too late, and is refused.

"And how is the intended victim rescued? By the merest verbal quibble. Portia says:—

"Tarry a little;—there is something else.—
This bond doth give thee here no jot of blood;
The words expressly are, a pound of flesh;
Take then thy bond, take thou thy pound of flesh;
But, in the cutting it, if thou dost shed
One drop of Christian blood, thy lands and goods
Are, by the laws of Venice, confiscated
Unto the state of Venice."

"Gentlemen, I should be sorry to profane Shakespeare, or to approach the creations of his genius in the same spirit that I should a report in Meeson and Welsby. Considerable latitude is to be allowed to the dramatist; but when I see Antonio saved by a species of construction, according to which, if a man contracted for leave to cut a slice of melon, he would be deprived of the benefit of his contract unless he had stipulated, in so many words, for the incidental spilling of the juice, one cannot help recognising in the fiction of the immortal poet an intensified representation of the popular faith, that the law regarded the letter and not the spirit.

"As to the tender coming too late, that was in strict historical accordance with the law. At common law, if a bond was once forfeited by non-payment of principal and interest on the day stipu-

lated, the whole penalty must have been paid. In these cases of forfeited bonds, before the reigns of William III. and Anne, when the Legislature interfered to regulate the proceedings at common law, the only remedy for an obligor, who had allowed the time for payment to elapse, was to file a bill in equity offering payment of principal and interest. It is clear that, had the scene of Shakspeare's play been laid in England, and not in Venice, the proper advice for Portia to have given, would have been, to file a bill in Chancery. But, I confess, I cannot say that the play would have been improved.

"The ground upon which the interference of the equity courts is now rested in these cases of forfeited bonds, is the maxim above referred to—that equity regards the spirit, not the letter; that in the substance the bond was intended as a security merely: that the precise day of payment was immaterial.

"To the same maxim also is to be referred the equity jurisdiction in allowing the redemption of mortgaged lands after the day stipulated by the contract. You are aware, doubtless, that in the ordinary form of mortgage the borrower conveys his property absolutely to the lender, subject to a stipulation that, upon payment of money borrowed and interest, on a particular day, the property shall be reconveyed to the borrower. In the older form of mortgage, the stipulation commonly was, that, upon payment on the day named, the deed should be void, or that the borrower should be at liberty to re-enter. The common law courts, construing these conditions with the utmost strictness, held that, unless the money were paid on the very day, the estate was lost to the mortgagor. The Court of Chancery, on the other hand, looking to the spirit of the transaction, held that the land was, in substance, a pledge merely, and that time was not of the essence of the bargain; and that, therefore, the mortgagor should be allowed to come after the time fixed and pay the principal and interest then due, and obtain back his estate.

"While, however, we value to its full extent the maxim that the spirit and not the letter is to be regarded, it must be confessed that the heads of equity which are attributed to the application of this maxim are those which it is the least easy logically to justify. The ordinary money bond, for example, must, in its earliest use, have been meant to represent the true contract between the parties, and, if deliberately entered into, no valid ground for interference seems to exist.

"In fact, to justify the equity jurisdiction, the existence of an epoch must be supposed intermediate between the first use of the bonds and the exercise of the jurisdiction, during which these money bonds (which originally truly represented the contract between the parties) came to be used merely as a convenient form of security; and I am not aware that legal history warrants such a supposition."

We feel satisfied that the volume of Mr. Haynes will well repay careful perusal; and, indeed, we know no work which, in so small a space, affords so clear and accurate a view of the more important of the doctrines appertaining to equitable jurisdiction. Both practitioner and student will find much to interest, and also to instruct.

COURSES OF LAW STUDIES.

(Continued from p. 328).

Parent and child.—We read (1 Bl. Com. 353), that “the father may have the benefit of his children’s labour while they live with him, and are maintained by him; this being no more than he is entitled to from his apprentices and servants.” But surely there is no analogy between the supposed condition of children and that of apprentices and servants; for the former have a natural, original, indefeasible right to maintenance, which the latter have not. By the very act of begetting them the parents have entered into a voluntary obligation to provide, that the life which has been by them bestowed shall be by them protected and preserved. So far, indeed, does our law carry this principle, that where the expenses of the maintenance of an infant have been afterwards sued for by the parent, to be paid out of the infant’s estate upon his coming of age, it has been always disallowed in equity (3 P. Williams, 154: Gilb. Evid. 93; 9 Ves. 675).

Master justifying assault in defence of servant.—In the same loose manner of reasoning again, it is said, that “a master may justify an assault in defence of his servant, because he has an interest in his servant, not to be deprived of his service” (1 B. C. 429). In the event of the master being deprived of the service of his domestics, the law has provided him a sufficient remedy, by action of trespass upon the case, *per quod servitium amisit*. He originally contracted for the supposed service, upon a pecuniary consideration, and now receives a pecuniary recompense for the loss of it, which is all that can, in reason, be required; for, if men were allowed, under such circumstances, to take the law into their own hands, and to justify assaults in defence of the persons of those in whose services they may have acquired a temporary interest, it is evident that this doctrine might be of dangerous consequence, and lead to endless contention and violence (1 Salk. 407). The reason that the parent is allowed to justify an assault in defence of the persons of his children, is not because he has an interest in their service (and yet he too may have a *per quod servitium amisit*, which shows that he has an interest), but because of his natural duty and parental affection; and even this the law rather permits than enjoins (1 C. B. 450). How much less, then, will the law justify in a master, an act of violence in defence of a servant, which it only excuses, rather than justifies, even in a parent acting in defence of his children! [In the case of *Leewerd v. Basilee* (Salk. 407; Ld. Raym. 62), it was said by the court that a master could not justify an assault in defence of his servant, because the master might have an

action, which opinion is adopted in Bull N. P. 18. However, in Com. Dig., in two different vols., it is said that the master can justify in defence of his servant, and Steph. Com. (vol. 2, p. 245, 4th edit.) is to the same effect; but the point is one of some doubt].

Acquiring property in enemy.—Again, it is a mistaken notion, and no part of the law of England, that “a man may acquire a property in the person of his enemy, by taking him a prisoner in war; no, not even till his ransom be paid” (2 B. C. 402). There is no doubt that at different periods of our history, not only this but many other equally uncivilized and barbarous doctrines have been held to be part of the common law. Lord Coke tells us, that anciently, if a man was outlawed (but which he could not be, by the old law, excepting for some capital felony), he was looked upon as a wild beast, and any one who met him might put him to death: and this (he observes) continued to be the law for some time after the conquest, till the judges, in the beginning of the reign of Edward III. had the humanity to resolve it to be murder (Co. Litt. 128 b.). But I presume, with all due submission, that we have no more to do with the doctrines and precedents of those remote times, where they interfere with the interests of humanity, and, as in the present instance, are confessedly against natural reason and justice than we have to do with the laws of old Rome or of modern Barbary. To the proposition which is also laid down as a sequel to the preceding, viz. “that the master has a property in the perpetual service of his captive negro,” we may oppose the same general reasoning. For perpetual service or servitude, is only another name for strict slavery; and upon no principle of the law of England will a court of justice, at this advanced period of civilization, attempt to enforce so improvident an engagement. Adjudged in 1772, when James Somerton (a negro) was brought before the court by *habeas corpus*, and immediately discharged (11 St. Trials, 840).

Bastards—Clergy—Remainders—Covenant to stand seized.—Again; are we to understand, as we read in one chapter, that “a clerk, presented for institution, may be refused by the bishop, if he be a bastard” (1 B. C. 389); or is it, as we are informed in another chapter, that “the disqualification of bastardy from holding any dignity in the church is now obsolete,” and that, “in all other respects, there is no distinction between a bastard and another man” (1 B. C. 459)? Neither, again, is it correctly stated, that in all other respects there is no distinction between a bastard and another man; for the law (perhaps in favour of marriage) is much less indulgent to bastards than to legitimate children.

Thus, the limitation of a remainder to an unborn bastard is void (3 Co. Litt. b.; 1 P. Wms. 529). And so, again, in our courts of equity, there is not the same favour shown to bastards as to legitimate children. Thus, on a covenant to stand seised, an *ass* will not rise to a bastard, because the considerations of lawful blood and marriage, which are peculiar to such covenant, necessarily exclude bastardy (Co. Litt. 123 a.; and see the note 189 *ibid.*).

Selling stock, &c., rendering subject to bankruptcy laws.—Quære again, whether buying and selling bank stock, or other government securities, will not make a man a bankrupt, they not being *goods, wares, and merchandise*, within the meaning of the statute, &c. (2 B. C. 476). There is no difference, I apprehend, with respect to the question of bankruptcy, whether the buying and selling is of bank stock, and other government securities, or of goods, wares, and merchandise; but if a man is in the continued practice of buying and selling for profit, he will, in either case, be held to be equally liable to become a bankrupt. It is not the having the stock, or occasionally dealing in the stock, that makes the bankrupt, but the continued practice of buying and selling for profit. Thus, if a man buys and sells stock by commission, he is only a species of broker, and consequently is liable to become a bankrupt; which plainly shows, that the distinction, which the law looks to, is not that which relates to the quality of the commodity bought and sold, but that between occasional dealing and the continued practice of buying and selling for profit. [The position of Blackstone is founded on a dictum of Lord King's which it has been said had reference rather to the Statute of Frauds than to the Bankruptcy Statutes. Mr. Cullen (p. 17, note) thinks it is not a trading on another ground, viz., that stock is more in the nature of a fixed property than a trading capital, and that the buying and selling it rather resembles land jobbing or buying a particular estate and selling it again at a profit, but Lord Henley (p. 10) does not think this satisfactory. The position of Blackstone is repeated in Steph. (p. 160, 4th edit.) with the addition "on his own account."]

Dissolved monasteries—Donatives.—Quære again, whether in those chapters, that were founded by Henry VIII. out of the spoils of the dissolved monasteries, the deanery is donative, and the installation merely by the King's letters patent (1 B. C. 382). The statutes prescribing presentation to the deaneries of the new foundation, were considered to be informal, and consequently void, till they were subsequently confirmed by the stat. 6 Ann. c. 21; and, therefore, it seems Lord Coke was fully justified in describing those deaneries as

donative (Co. Litt. 95 a.). But, since the stat. of Ann. above-mentioned, the deans of some, if not of all the chapters of the new foundation, are held to be *pre-entative* and not donative; the practice being to present the letters patent to the bishop for institution and a mandate of instalment (see the notes 102 & 105, to Co. Litt. 95 a.).

Elegit—Possession not given.—Quære again, whether the writ of *elegit* gives the sheriff the power to deliver the debtor's freehold lands to the plaintiff, to hold, &c. (3 B. C. 419). On the contrary, it seems that the sheriff can do no more than make the necessary appraisement and the return of the writ, after which the creditor must bring an ejectment in order to obtain possession (Tidd's Practice, 930; and see 3 T. Rep. 295, Taylor v. Cole). [The distinction is stated in First Bk. pp. 149, 277, 278].

Traitor—Forfeiture.—Again, if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no forfeiture of his lands; for he never was attainted of treason (Co. Litt. 13 a.). "But (says Blackstone), if the chief justice of the King's Bench, the supreme coroner of all England, in person, upon view of the body of him killed in open rebellion, records it and returns the record into his own court, both lands and goods shall be forfeited" (4 B. C. 382). Now this is, in substance, taken from the Fourth Report p. 57; and it seems that the ancient law was so (Co. Litt. 890 b.; and note 345); but it has been since held, and so it was long before Blackstone wrote, that none can be attainted after death but by act of Parliament (2 Hale, 58; 2 Vent. 38). It follows, that, in the present instance, the forfeiture can only be of the goods, and not of the lands, as is here asserted (4 Hawk. P. C. 475; 1 Hale, 342, 349).

Defects in pleadings.—"But if the thing omitted (says Blackstone), be essential to the action or defence, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is totally defective in itself; or if to an action of debt, the defendant pleads *not guilty*, instead of *nil debet*, these cannot be cured by a verdict for the plaintiff, in the first case, or for the defendant in the second" (3 Bl. Com. 394). If the plaintiff sets forth a title that is totally defective in itself, there is no doubt that this defect in the declaration destroys the merits of the action, and, therefore, cannot be cured by verdict. As for example: if the obligee declares in *assumpsit* against the heir, on a promise to pay money due on the bond of his ancestor, without declaring that the ancestor bound himself and his heirs, he shall gain nothing by his verdict; for the heir is not bound unless he is expressly named in the obligation of his ancestor, and unless

the ancestor has also bound himself in the same bond (Co. Litt. 384 b, 386 a). And the heir could not have made himself subsequently liable by his particular assumpsit or promise; for, as there was originally no cause of action, there could be no consideration upon which the assumpsit could be grounded (2 Saund. pt. 1, c. 24). But where the defendant pleads *not guilty*, instead of *nil debet*, this is a defect in the traversing. It is an informal or improper issue upon a material allegation; and, therefore, although the plaintiff may take advantage of it, if he will, before verdict, yet if he carries down the record to trial, and a verdict is had thereon, the mistake is rectified by the statute 32 Hen. VIII. of jeofails.

Profert and oyer of deeds.—Again; we read that “the defendant craves *oyer* of the writ, or of the bond, or other specialty upon which the action is brought, that he may hear it read to him; the *generality of defendants, in the time of ancient simplicity, being supposed incapable to read it themselves*; whereupon the whole is entered *verbatim* upon the record” (3 Bl. Com. 299). Until recently (C. L. P. Act, 1852, s. 55, abolishing *profert* and *oyer*), it was a rule in pleading, that wherever there were deeds which were relied on, they must have been regularly shown to the court, without which the court could take no judicial notice of them. The doctrine of praying *oyer* was a consequence of this general rule. The plaintiff concluded his declaration with the *profert*, and he brought here into court the writing obligatory aforesaid; then came the defendant and craved *oyer* of the said writing obligatory; for, being already in the possession or custody of the court, by the *profert* on the other side, there was no necessity for his setting it forth specially in his own plea. It was then read to him, not from the visionary and quaint idea of his either being a stranger to its contents, or incapable of reading it himself, but for the simple and obvious reason that the court might take judicial notice of it, which otherwise they could not do; and thereupon the whole was *not entered verbatim* upon the record (as Blackstone says), but only that part of the instrument which the defendant relied upon, and, therefore, showed to the court as material to his defence. Thus, upon his praying *oyer* of the bond, it was said, “and it is read to him,” without more saying; but upon his praying *oyer* of the condition, it was said, “and it is read to him in these words,” and accordingly entered *verbatim* upon the record as part of the pleadings. And the reason of this distinction was that the obligation, where there is a bond upon condition, is merely noticed as the introductory part of the instrument of which the substantial was the condition; for it was the con-

dition which shows the real nature of the debt or duty for which the obligation was given.

Tender and refusal—Pleading.—“And sometimes (says Blackstone), after tender and refusal of a debt, if the creditor harasses his debtor with an action, it then becomes necessary for the defendant to acknowledge the debt and plead the tender; adding, likewise, the *encore prêt*, that he is still ready, &c., and sometimes the creditor will totally lose his money in such cases” (3 B. C. 303). But have we any idea, from hence, of these supposed cases? Can we, by any possibility, guess at the principle? Or, do we know how to distinguish (as between debts and contracts), where the *encore prêt* should be pleaded, and where not. A few remarks by way of explanation will suffice. If the defendant, in an action of debt on bond and other specialty, pleads a tender and refusal, according to the condition, &c., he must also plead the *encore prêt*, that is to say, that he is still ready to pay, or bring the money into court. [Indeed, in general the money must be brought into court]. For this is *prima facie*, a debt which remains still unsatisfied. The very condition upon which the defendant relies, in this instance, is itself evidence of the debt: *et liberata pecunia*, says the law, *non liberat offerentem* (Co. Litt. 207 a.); for it might possibly have been delivered for some special purpose, or upon some other account. But if the obligee has made a *deed of defeasance to the obligor*, upon condition, &c., the obligor, after tender and refusal, may plead the same without the *encore prêt*; for this is, *prima facie*, not a debt, but a contract in the nature of a conditional release, and the defendant having performed his part by the tender, the condition is now satisfied, and the release become absolute and unconditional (Co. Litt. 107 a.). Upon the same principle, if the obligee accepts a *recognisance from the obligor*, with condition to be void upon the payment of a smaller sum on a certain day, and, on the day fixed, the debtor tenders and the creditor refuses the same, he can never afterwards recover either the one sum, or the other. For the original debt was satisfied by the recognisance, and now the recognisance itself is satisfied by the tender and refusal. For this is, *prima facie*, not a debt, but a contract, of which tender and refusal are always equivalent to performance (Co. Litt. 207 a.). So, again, in the case of a *pledge or pawn*; the pawner, after tender and refusal, may either bring an action of assumpsit, and declare that the defendant promised to return the goods upon request, or he may bring an action of trover, for the property is vested in him by the tender; which proves, that it is, in effect, the same thing, whether the money is tendered and refused, or actually paid (Cro. Jac. 243; Yelv. 149; 1 Bulstr. 29). In the

same manner, where a *feoffment* is made upon condition for the payment of a *collateral sum*, if lawful tender be once refused, he, who ought to tender, is of this quit, and fully discharged ever afterwards (Co. Litt. 209 a. b.). And so in all cases, in which the obligor is to do some *collateral* thing, as to deliver a horse, &c., if the obligor offers to do his part, and the obligee refuses, the condition is performed in law, and the obligation discharged for ever (Co. Litt. 207 a.).

Of the construction of the usual covenants and powers in marriage settlements.—In the construction of the usual covenants and powers inserted in marriage settlements, it is to be observed, in the first place, that the covenants for further assurance, &c., are not against all claimants generally, but only against those who claim from or under the covenantor. Why? Because if the parties were to covenant generally, it would be necessary for them, in that case, to keep the title-deeds. For, if any one is bound to warranty, so that he is bound to render in value, then is the defence of the title at his peril; and, therefore, the feoffee shall have no deeds that comprehend warranty whereof the feoffor can take advantage (Co. Litt. 6 a.). Secondly, the covenants are always expressly against lawful lets and interruptions, in contradistinction to unlawful or tortious entries; for, in the last case, the party has his remedy by action of trespass or ejectment against the wrongdoers; but, having no such remedy against those who claim under the covenantor himself, by a title paramount to that of the grantee, he then, and then only, may bring his action of covenant by force of these words of warranty. Pursuant to the above doctrine, the plaintiff who brings this action (of covenant for quiet enjoyment, &c.) must not only allege that the person evicting him had lawful title, but that he had lawful title before the grant or lease made to the plaintiff, for, otherwise, it might be from the plaintiff himself, that the evictor derived his title; and a conclusion of law does not help the not showing a matter fact. He is not, however, required to set out the title "specially" of the person who entered upon him, because it is presumed in law, that every one is the depository of his own title, and that others are strangers to it. Again, with respect to the *powers of leasing, of jointuring, of raising portions, of revocation, &c.*, upon what principle is it that the reservation of these, which would be void and of no effect in a deed of feoffment, or fine, or recovery, or even lease or release, shall be valid in a deed of settlement? It is because this enures by way of *declaration of the use*, but those conveyances have their operation by virtue of the transmutation of the possession, the constructive

differences of which have been already exemplified. Another rule to be observed is, that the respective powers and covenants must be always of the same nature, and stand well together in point of consistency. Thus, if a power of leasing were inserted in a covenant to stand seised to uses, it would be void and of no effect; because they are contracts of a different nature, the latter being always for a good consideration, such as a natural affection or blood; the former for a valuable consideration, meaning money, or money's worth; and, therefore, the two together would be repugnant (Co. Litt. 237 a.). That I may not, however, fatigue the reader's attention by extending these remarks to an unreasonable length, I will conclude by observing, that even the marriage settlement itself, in Blackstone (which every beginner in this course of study will naturally presume to be a model of the kind), is of the same inaccurate and incomplete description with all the rest; as may be seen by the omission of the usual powers of leasing, jointuring, and charging, after the limitation to the husband, and more particularly by the omission of *cross-remainders* after the limitation to the daughters (B. C. Appendix to the 2nd volume p. vi.). For, by reason of the daughters taking as tenants in common, and not as joint tenants, it might so happen that the reversioner might enter, living issue by the daughters, which evidently could not have been intended; and, although an omission of this kind might be supplied in a devise, by implication of law, there is no such implication to be admitted in a deed of settlement. If A. devises black-acre to B. and white-acre to C. in tail, and if they both die without issue, then to D. in fee; here B. and C. have *cross-remainders* by implication; that is to say, on the death and failure of issue, of either of them, the other and his issue shall take the whole; and D.'s remainder over shall be postponed till the issue of both shall fail. But it is otherwise if A. makes the same conveyance "by deed"; for the construction of a deed is always "*stricti juris*", according to the ancient simplicity of the common law (See the note 82 to Co. Litt. 195 b.; Burt. Comp. pl. 668, note; Edwards v. Aleston, 4 Russ. 78, 88; 3 Ex. R. 120; Hayes' Convey. 509, n. 46, 4th edit.; 1 Prest. Est. 94).

Upon the whole, then, if it is true, as I have here suggested, that the law is a science capable of demonstration, and, therefore, demanding from us the exercise of an intelligent and reasoning mind, and not the labour of the hands in copying precedents; and, if it has likewise been fairly and truly stated of Blackstone's Commentaries, that they are but an abstract, superficial, and often incorrect sketch of the elements of the law, and nothing more, and which

was originally intended for unprofessional readers alone, and not for students; if I am right, I say, in these two suggestions, it follows, that the system of education, which has given occasion to the foregoing strictures, independently of the irksome drudgery that attends it, is at once an ineffectual and absurd system, and such as cannot but produce infinite embarrassment to the individual, and every possible mischief and inconvenience to the public. With this reflection, I shall, therefore, venture to conclude this first part of our present inquiry, and not without a hope, that the hints which are contained in it may be useful to others who engage in the same course of study. The public have done ample justice to Blackstone's Commentaries, and most willingly do I subscribe my feeble testimony in acknowledgment of the extent of their claims to it; they have enabled many an unprofessional reader (who would probably have read nothing else), to form to himself a general notion of at least the outline of this interesting and important learning; and, were it only in this single view of them, the value of their publication would be unquestionable:—

Neque ego illi detrachere ausim

Hærentem capiti multâ cum laude coronam.

In the midst, however, of these deserved praises, let us beware of so far deceiving ourselves, and at the same time of doing such an injustice to Blackstone, as to set up his commentaries as an institute for educating and forming lawyers. In the rank of elementary composition, they might for ever have reposed beneath undisturbed laurels; but he who would make them the institute of his professional education, providently forces them into an element which is not their own, and lays the foundation for those perilous misunderstandings—that un lawyer-like jejune smattering, which informs without enlightening, and leaves its deluded votary at once profoundly ignorant and contented.

VENDORS AND PURCHASERS.

OFFER AND ACCEPTANCE.—*Retracting* [vol. 2, p. 133; vol. 3, pp. 3—5]—*Specific performance*—*Withdrawal of offer*—*Locus pœnitentiæ*.—We refer the reader to vol. 2, p. 133, for an explanation of the principle of the following decision. A. signed a memorandum of agreement, by which he agreed to sell to B. and C., all his interest in a partnership business, on a certain valuation, "this purchase being contingent upon B. and C. being able to agree on the purchase with the rest of the retiring partners." The memorandum was not then signed by B. and C., who proceeded to negotiate with the other partners for the purchase of their interests. A fortnight after

signing the memorandum, A. wrote to B. and C., withdrawing from his offer, on the ground that they had not complied with the condition alleged to have been verbally made by him, that they should accept within a week. Letters passed, in which B. and C. did not state that they had accepted the offer, or that they considered A. as irrevocably bound, but that they had not as yet been able to complete the negotiations. They subsequently signed their acceptance upon the memorandum of agreement: Held, that there had been no such acceptance by B. and C., before A. had withdrawn from his offer, as to constitute a binding agreement against him for the sale of his partnership interest, of which specific performance could be enforced, or so as to preclude him from his right to the partnership account. *Horsfall v Garnett*, 6 Week. Rep. 387.

ASSIGNEES PURCHASING DIVIDENDS [*ante*, p. 329]—*Purchases by trustees and cestui que trust*—*Purchase by assignee in bankruptcy of dividends under the bankruptcy*.—The decision of V. C. Kindersley, noticed *ante*, p. 329, has been overruled on appeal. It will be remembered that W., who had been formerly the solicitor of a creditor of a bankrupt, purchased the future dividends on the debt due to the creditor. The purchase was made, partly for the benefit of W., and partly on the behalf of Q., who was a creditor's assignee in the bankruptcy, and another person. Q. was an accountant, and his partner was employed as accountant in the bankruptcy. The Lords Justices of Appeal held, in a suit by the creditor to set aside the sale, that the participation of Q. in the transaction, invalidated the sale, both with respect to his interest, and that of the other purchasers. The rules by which the trustee is bound in dealing with his cestui que trust apply with stronger force to dealings between assignees in bankruptcy, and the creditors. The system of assignees purchasing the debts of the creditors strongly disapproved of. *Pooley v. Quilter*, 6 Week. Rep. 402; 31 Law Tim. Rep. 64.

SPECIFIC PERFORMANCE.—*Covenant to build according to approved plan*.—Where the parties to a contract stipulate for something to be done according to the approval of one of them, the jurisdiction of equity to compel specific performance is ousted, so far as it is necessary to have such approval from the defendant to the suit. Where an agreement for a lease contained a stipulation that the tenant should build a house of the value of £1400, according to a plan to be approved by the lessor, specific performance on the application of the tenant was refused. *Quære*, whether a decree could have been made in the absence of the condition as to approval. *Brace v. Wehnert*, 6 Week. Rep. 425.

LAND TAX REDEEMED.—*Conditions of sale*

—*Things recited or stated in deed—Showing sufficient title what.*—The following is a decision at common law on the terms of conditions relative to recitals and statements in deed, showing that the recitals or statements must be of something alleged by way of direct recital or statement, and not mere inferences. Conditions properly drawn would provide for the latter. Where, by a contract for the sale of land, the land is described as "land tax redeemed," the vendor is bound to give reasonable evidence that the land tax has been redeemed, or that, if purchased, it is in his power to transfer or release it; and, ordinarily, the proper evidence of this would be the certificate of the commissioners, or a copy of the register. In the case of such a contract, the 7th condition of sale was, that "every deed and entry on or copy of court roll, dated more than ten years ago, should be conclusive evidence of everything recited or stated therein;" and among the muniments of title was a conveyance by deed dated more than ten years back, from M. to H., from whom the property came by various mesne assignments to the present vendor, which deed, in the witnessing part of it, contained a statement as follows: "It is witnessed, &c., and in consideration of the sum of £290, &c., to the said M., &c., paid by the said H., &c., the receipt of which the said M. acknowledged, and that the same was in full for the absolute purchase" of the premises, "and the fee simple and inheritance thereof in possession, free from land tax and all other incumbrances." Held, that this was not a statement of the fact, that the land tax had been redeemed, but only an acknowledgment by the then vendor, that the then purchaser had paid £290 for the land as being free of land tax and other incumbrances, and that it was consistent with such statement that the land tax had not been redeemed, or at least that it had been purchased and assigned to the then purchaser, or a trustee for him, in whom, or his representatives, it might now be vested. That the statement to bind the purchaser under the 7th condition ought to be something alleged by way of direct recital or similar statement in the deed, and not merely matter to be inferred as the probable, not certain, result of what was stated. *Buchanan v. Poppleton*, 31 Law Tim. Rep. 372.

MORTGAGE TO TRUSTEES.—*Stock not discharged by paying money.*—The following is an instance of the evils resulting from mortgage transactions disclosing trusts, either of the mortgage money or the estate, compelling the parties to look to the terms of the trusts:—Where a mortgage was made to secure a sum of stock, which was for the purpose sold by trustees who had power to give receipts for monies and power to vary securities, the mortgage was held, as between vendor and pur-

chaser, not to be sufficiently discharged on payment of a sum of money to the trustees, the money not appearing to have been again invested in stock or upon security. *Pell v. De Winton*, 27 L. J. Ch. 230.

COVENANT TO PRODUCE DEEDS.—*Sale in lots—Costs—Petition—Payment out of court.*—The following decision (by V. C. Stuart) is one quite contrary to the prevalent opinion of the profession, and one of peculiar hardship on a purchaser in regard to covenants for production of deeds on a sale in lots. The other point as to the costs of a purchaser served with a petition is in accordance with other decisions, though some earlier ones were the other way. Although, by the practice of conveyancers, the costs of covenants to produce title deeds which cannot be delivered up, fall on the vendors; yet where, by the conditions of sale in property in lots, provision is made for the largest purchaser to have the deeds, and to covenant to produce them to the purchaser of smaller lots, without reference to the manner in which the costs are to be paid, each purchaser, and not the vendor is bound to bear his own costs of such covenants. A purchaser is entitled to his costs of appearing upon a petition for paying his purchase money out of the court, although he is informed in the notice of the petition that he is not required to appear, and the petitioner will object to his costs of appearance. *Stroud v. Stroud*, 6 Week. Rep. 455.

COPYHOLD.—*Enfranchisement Acts—Agreement to obtain enfranchisement—Reservation of mines and minerals.*—The following is a most important decision as to contracts for the purchase of copyholds about to be enfranchised, inasmuch as it shows that the lord's title is not important, and that the purchaser may be precluded from making objection on the ground that the mines and minerals belong to the lord under the Enfranchisement Acts. It suggests the propriety of never entering into a contract referring to acts of Parliament or other documents without looking to their effect. The decision was that under the Copyhold Enfranchisement Act, 1852, a good title to the lands enfranchised may be made without any proof of the lord's title. Under an agreement made the 15th of June, 1853, whereby a copyholder agreed to sell a copyhold estate, and to make a good title to the land so enfranchised, with a proviso that the agreement should be void if the vendor failed to obtain enfranchisement: Held, that the agreement must be taken to have referred to the statutes, and that the purchaser was bound to accept a title subject to the reservation of minerals and other rights mentioned in the 48th section of the act of 1852. *Kerr v. Pawson*, 6 Week. Rep. 447.

CONDITIONS OF SALE.—*Providing for rescission of contract—Purchaser's requisitions—Right of*

vendor to rescind contract—Specific performance.—We have at various times called attention to the importance of the due framing of the conditions of sale, and the following case is another example for the profession on this head, and is especially instructive as showing how closely the courts hold a vendor to the terms of his own conditions. It is unfortunate that the peculiar circumstances of the vendors in the following case prevent them from taking the opinion of a court of appeal on the point. One of the conditions of sale of certain leasehold premises, provided that if the purchaser should show any objection, whether of title, conveyance, or otherwise, and should insist thereon, the vendor should be at liberty to rescind the contract and annul the sale, on returning the deposit without interest or costs. The purchaser delivered certain requisitions on the title, some of which were covered by special conditions of sale. He also required the concurrence of certain mortgagees in the assignment. The vendor acknowledged the receipt of the requisitions, and stated that they were of such a kind, that he thought fit to rescind the contract, and annul the sale. On a bill filed by the purchaser for specific performance, waiving all objections to the title which the vendor should be unable to comply with: Held, that the vendor was not justified in rescinding the contract under the condition, without making any reply to the purchaser's requisitions, although untenable, and a decree was given for specific performance, with costs, the plaintiff waiving all objections to the title. (*Greaves v. Wilson*, 31 Law Tim. Rep. 68). This case is so important, and the doctrines enunciated by the Master of the Rolls, so deserving of attention, that we give his judgment at some length. His Honor said, "I am of opinion that the plaintiff is entitled to a decree for specific performance. The mode in which conditions of sale must be construed, is laid down very clearly in all the authorities upon the subject; and, I think, nowhere more clearly than by Sir James Wigram. They must be construed, like any other instrument, *most strictly against the person who frames them*, because he alone can judge of the necessity or propriety of making such conditions before he offers the property for sale. In addition to that, it is to be borne in mind, that a person who offers property for sale has certain duties which attach to him in that character, and he cannot get rid of these duties by selling, subject to this particular condition: for instance, he cannot by a condition of sale of this description, compel a purchaser to take a title upon an *insufficient abstract*, if he is able to give him a complete one. He is bound to perform the duty of a vendor as fully as he is able to do, subject to this exception, that the duty shall be reasonable; for the reasonableness of the

thing required, is always a question with the court, and whether it may occasion a great amount of labour and expense; for, although it may be in his power to do it, it may involve so much expense and trouble, as to make it unreasonable that he should be called upon to do it. This exceptional condition is framed with a view of meeting a case of that nature. But *Page v. Adam* (4 Beav. 269), establishes this proposition—that a vendor cannot make use of such a condition of sale as this, *to rescind a contract for the purpose of getting rid of a duty which attaches to him upon the rest of the contract, namely, to make out a good title*; and accordingly, in that case, Lord Langdale held the notice to rescind the contract to be null. These conditions, then, are to be construed most strictly against the vendor. Assuming—which is my present impression—that certain of the requisitions upon the title were not tenable, being covered by the conditions of sale, still the vendor cannot on this account, be entitled to say, 'I will put an end to the contract at once, without making any observations on the subject.' The condition says—'If the purchaser, shall, within the term limited, show any objection, whether of title, conveyance or otherwise, and shall insist thereon, the vendor shall be at liberty to rescind the contract, and annul the sale.' Does that mean, that if a requisition is made to the vendor, which he disapproves of, or which he dislikes, thereupon he is to be at liberty at once to say, 'I will put an end to the contract?' It is clear it would not in some cases. Suppose this had been simply a requisition that the mortgagee should join in the conveyance to the plaintiff, could it be argued that the vendor would be at liberty to say, 'I will put an end to the contract?' It was necessarily incidental to the sale, that the vendor should sell the premises discharged from all incumbrances, and therefore to get the persons who were incumbrancers to join in the conveyance. I am of opinion, that under the words, 'shall show any objection, and shall insist thereon,' the vendor's solicitor was bound to say, 'with respect to some of these requisitions, they are untenable, and with respect to others, we cannot comply with them; with respect to the last, namely, that requiring the concurrence of the mortgagees, we will obtain their concurrence.' If, after making an answer to that effect, the plaintiff, the purchaser, had said, 'I insist upon having these requisitions complied with,' then the vendor might have been entitled to say, 'I don't wish to have a Chancery suit for the purpose of determining that question, and I will put an end to the contract of sale.' But even in such a case, there must be a certain degree of reasonableness; because, if the sole requisition had been, that the mortgagee should join in the conveyance, that would not have entitled

the vendor to put an end to the contract. In my opinion, the defendant was not entitled to give notice to rescind the contract at the time and in the manner he did, *without giving any answer to the requisitions*. Considerable light is thrown upon this matter by a circumstance, which appears on the evidence, that this was a very unfortunate sale for the defendant; that the property was sold for much less than it was worth—much less than the reserved price. This circumstance, in my opinion, tells against the defendant; but the circumstance, that the property sold unfavourably, was no reason for putting an end to the contract. If it was intended to make use of this condition of sale, for the purpose of avoiding the sale, in case the property should not be sold for the full value, *then this condition of sale was fraudulent*, and it cannot be allowed to be made use of for that purpose."

NOTICES OF NEW BOOKS.

STEPHEN'S NEW COMMENTARIES.

New Commentaries on the Laws of England (partly founded on Blackstone). By HENRY JOHN STEPHEN, Serjeant-at-Law. Fourth edition. Prepared for the press by JAMES STEPHEN, LL.D., of the Middle Temple, Barrister-at-Law, and Professor of English Law and Jurisprudence at King's College, London. In four volumes: £4. 4s. London: Butterworths.

If Blackstone's object in the preparation of his Commentaries, whether in the original shape of college lectures, or in the subsequent form of a published work, was to attract the attention of his fellow countrymen, he certainly attained it to an eminent degree; and not merely in his lifetime, but even now, though it is long since the inexorable *pallida mors* claimed him. Indeed, there is scarcely any work which has excited both friends and opponents to so great a degree, with probably the usual result—namely, on the one side an undue laudation, and on the other an excessive depreciation. The latter have not scrupled to attack the work in every possible shape, as for its errors in fact, its defects in general principles, and even for its bad style. This latter charge may seem somewhat startling in connexion with the well-known fact, that Bentham, Gibbon, and Robertson (with others), not merely read the Commentaries, but even submitted to the drudgery of copying them, with a view to the formation of a style—though it must be admitted that the influence of Blackstone in that respect is scarcely perceptible in them. The celebrated Fox deliberately stated that Blackstone's style was the best among modern writers; "always easy and intelligible,

far more correct than Hume, and less studied and made up than Robertson." Again, "his purity of style I particularly admire; he was distinguished as much for simplicity and strength as any writer in the English language." Sir James Macintosh says he was "a great master of classical and harmonious composition." The other merits of the Commentaries have been allowed by very eminent men in language sometimes a little too eulogistic. Thus, President Quincy (Dane Law College) speaks of "the great *magician* Blackstone stretching his scientific wand over the illimitable ocean without bound, and causing confusion to disappear." So Lord Avonmore says: "He it was who first gave to the law the air of science: he found it a skeleton, and he clothed it with life, colour, and complexion; he embraced the cold statue, and by his touch it grew into youth, and health, and beauty." Speaking of the chapter on "*Expectant Estates*," Chancellor Kent says: "I have read that chapter frequently, but never without a mixture of delight and despair." Sir William Jones says: "The Commentaries are the most correct and beautiful outline ever exhibited of any human science." See further testimonies fully stated 1 Law Stud. Mag. 10—12; 4 Id. 209—211, 233—236. On the other hand, Sedgwick, Ritso, and others have disparaged the Commentaries; and it is not to be doubted that the unpopular views which Blackstone enunciated respecting the "wisdom of our ancestors," "the perfection of the constitution and the law," and other similar laudatory flourishes, have given rise to many strictures which have not been altogether undeserving, though it would have been more fair to have confined them to the peccant parts, and not to have indulged, as many have, in a general condemnation of the whole work. From the very fact of Blackstone's work meeting with so much criticism it may fairly be concluded that it was esteemed worthy of notice, for, as Boileau is reported to have said, on some friends telling him that the critics spoke very severely of a recent production of his, "So much the better, for they never speak at all of *bad works*." In our opinion, the labours of Blackstone have never received a just appreciation from either friend or foe, nor has any one of his editors caught the true spirit of the work, or, at least, no one of them has worked by the light of it. It should be borne in mind that Blackstone was not a practical lawyer, but rather a literary character, as shown by his contributions to various publications, independently of those of which he was the sole author. And in the composition of his lectures, as in their subsequent adaptation to a book form, he had in view more the literary than the practical part of the law. Indeed, no discriminating reader can fail to perceive that the historical portions of

the work are those which have received the greatest polish and been most elaborated. Blackstone was near accomplishing for law what Johnson truly predicted Goldsmith would do for natural history—make it as entertaining as a Persian tale. We do not envy the youth who, reading the Commentaries for the first time, has not felt some degree of delight in accompanying the author over, at least, the historical parts of the work. If, indeed, such a reader possessed a knowledge of previous works on the law, his admiration would be greatly raised; even the sturdy Bentham has allowed himself to be so far moved as to declare: “Blackstone it is, in short, who, first of all institutional writers, has taught jurisprudence to speak the language of the scholar and the gentleman; put a polish on that rugged science; cleansed her from the dirt and cobwebs of the office,” &c.

Our object, however, is not now to speak so much of Blackstone as of Stephen—or, rather, of the Stephens, for Mr. Serjeant Stephen, the original author, has left the labours of the present, as of the former edition, to his son, Mr. James Stephen. We may observe, that some critic has said that Stephen's Commentary is just such a work as Blackstone, had he been now alive, would have produced—intending thereby, no doubt, great praise; but we believe that Blackstone could not have produced such a work as the present, because he did not possess the practical mind which has evidently presided over the editing of the New Commentaries. Again, it has been objected that Mr. Serjeant Stephen, instead of scrupulously noting what he has taken from Blackstone, would have done better to have made a general acknowledgment, and then have taken whatever he pleased without any indicating marks, but we consider the learned Serjeant has pursued a more satisfactory plan, inasmuch as a reader can at once see what is Blackstone and what is Stephen, and yet more, he may learn at a glance how far the text of Blackstone has been modified since he wrote—a matter of no little importance to the student. We must confess that the author has been extremely rigid in the application of his rule; thus, in Vol. i., p. 5, every portion of the page is Blackstone's except the simple word “again,” which has been contributed by Mr. Serjeant Stephen. This may seem to show an excess of conscientiousness.

The present is the fourth edition—the first having been published (in separate volumes) about sixteen years ago—which indicates a large degree of popularity for a work of such size, and at such a price. In reference to the work itself (putting out of view the originality of the plan), we may observe, it is wonderfully correct, forming in that respect a great contrast to some cheap editions of Blackstone, and contains a vast quantity of information, not only in the body, but

likewise in the notes. Indeed, the latter will frequently be found extremely useful to the practitioner, directing him to the latest acts of Parliament and cases on the various subjects noticed in the text. These notes are frequently made the vehicle of some information respecting the text of Blackstone, and thus the attention of the student is called more prominently to the matter. Thus, in Vol. i., p. 485, it is said: “Blackstone here gives an additional reason for the rule as to bastard éigné, that the law will not suffer a man to be bastardised after his death, who entered as heir, and died seised, and so passed for legitimate in his lifetime (2 Bl. Com. 248). And the same reason is given in Co. Litt. 244 a.; but the correctness of this view is questionable, for there is no other case in which the temporal courts allow the maxim, that a man shall not be bastardised after his death (see Co. Litt., by Butler, 244 b., n. s).” Again, at p. 457 of the same volume, speaking of the writ of *ad quod damnum*, and the 27 Edw. 1, s. 2, it is said: “The expression of Blackstone is ‘marked out’, but it has been justly observed, that the statute itself mentions the proceeding as a thing ‘accustomed.’” Again, at p. 614 of the same volume, speaking of estates being entangled with resulting trusts, &c., unknown to the simple conveyances of the common law, it is added: “Blackstone also enumerates *contingent remainders*, but these were known to the common law. They were probably considered encroachments on the common law (say the Real Property Commissioners) but were certainly allowed by it. They were early attempts to meet the contingencies of family settlements, and were introduced long before the Statute of Uses (Third Real Prop. Rep. 28).”

As to the practical nature of many of the notes we may refer to the following in Vol. i., on Inclosures and Exchanges: “The provisions of the 8 & 9 Vic. c. 92, and the subsequent acts as to *exchanges*, are extended to *partitions* by 11 & 12 Vic. c. 99, ss. 18, 14; and see 12 & 13 Vic. c. 83, s. 7, as to the application of those provisions to exchanges of rights of common or fishing, manorial rights, easements, quit rents, heriots, tithes, &c., for any other of the said rights. See also further provisions as to exchanges and partitions 20 & 21 Vict. c. 84, ss. 4—11. It is to be observed, that both an exchange and a partition may take place on the application of parties interested, even in cases where no proceedings for an inclosure are pending, or where the lands are not subject to be inclosed under the acts 8 & 9 Vic. c. 118, s. 147; 9 & 10 Vic. c. 70, s. 9; 11 & 12 Vic. c. 99, s. 18; 12 & 13 Vict. c. 83, s. 7; 17 & 18 Vic. c. 97, ss. 2, 3. On the construction of the provisions of these acts relative to exchanges, see *Minet v. Leman*, 24 L. J. R. Ch. 545.”

Again, speaking of estoppel, it is said in the note to p. 482: "We may here remark, that there are other species of estoppel besides the estoppel by *deed* mentioned in the text—viz., estoppel by *record*, and estoppel by *matter in pais*. The first obtains in the case where any fact is alleged in a court of record, or any judgment given therein; the second, where an act is done out of court. By such *matter of record*, persons who were parties to the suit—and, by such *matter in pais*, persons who were parties to the act in question—are in general precluded from afterwards alleging matters which would be contradictory to what the record or act imports. For further information as to estoppel, and the different species thereof, *vide* Plowd. 434; Co. Litt. 260, 352 a.; 1 Saund. by Wms. 325 a., n. (4), and 2 Saund. by Wms. 148; Hill v. Manchester Co., 2 Barn. & Adol. 544; Right v. Bucknell, 2 Barn. & Adol. 278; Lainson v. Tremeere, 3 Ad. & El. 742; Bowman v. Tayler, 2 Ad. & El. 278; Whitton v. Peacock, 2 Bing. N. C. 411; Cardwell v. Lucas, 2 M. & W. 117; Carpenter v. Buller, 8 M. & W. 209; Carter v. James, 18 M. & W. 137; Lyon v. Read, Id. 285; Downs v. Cooper, 2 Q. B. 256; R. v. Leominster, 5 Q. B. 640; Pargeter v. Harris, 7 Q. B. 708; Dawson v. Gregory, Id. 756; Smith's Leading Cases, Vol. ii., pp. 436, 460."

Each edition of the work contains less of Blackstone's text than its immediate predecessor, this being the natural result of the many legislative enactments made during the last sixteen years. Indeed, the work must not be considered in the light of an edition of Blackstone, but is entitled to rank as an original work. We should like to have presented various extracts from the work to support our opinion, but as it is one which is already, or will soon be, in the hands of most of our readers, we forbear doing this to any extent, and therefore confine ourselves to the following extract from the chapter on Husband and Wife, omitting the references and notes; the parts within *brackets* ([]) are due to Blackstone:—

"We are next to consider the manner in which marriage may be dissolved. This may be either by death or divorce. Prior to the new Divorce Act, 20. & 21 Vic. c. 85, there were [two kinds of divorce; the one, *à vinculo matrimonii*; the other, merely *à mensâ et thoro*.] The divorce *à vinculo* was founded on such canonical disability as already described, and was to be obtained from the Ecclesiastical Court. By the sentence, the marriage was declared [null, as having been absolutely unlawful *ab initio*,] and the parties were therefore [separated *pro salute animarum*]; and by the effect of the sentence the issue became bastards; and the parties were at liberty to contract another marriage. Divorce *à mensâ et thoro* was the remedy where the marriage was lawful *ab initio*; but from some supervenient

cause it became improper for the parties to live together, as in the case of intolerable cruelty in the husband, adultery in either of the parties, a perpetual disease, or the conviction of the husband for an unnatural offence. It was from the Ecclesiastical Court that this kind of divorce also was to be obtained. But it could not be obtained by the husband, as for adultery, if the wife recriminated and proved that he also had been *unfaithful* to the marriage vow, or if it appeared that after knowledge of her adultery he had cohabited with her. The sentence for this divorce, though it effected the separation of the parties, did not annul the marriage, and it was therefore essentially different from the divorce *à vinculo*. By its effect the wife, if the innocent party, generally became entitled to *alimony*, that is an allowance [for her support out of the husband's estate, being settled at the discretion of the ecclesiastical judge on consideration of all the circumstances of the case,] and generally [proportioned to the rank and quality of the parties.] But the law allowed no alimony to the wife, in case the divorce was obtained for adultery on her part, nor in case of her having from other sources a sufficient income.

The divorce *à vinculo* could not be obtained for any cause supervenient upon the marriage; for the canon law, which the common law followed in that respect, [deems so highly and with such mysterious reverence of the nuptial tie, that it will not allow it to be unloosed for any cause whatsoever that arises after the union is made. And this is said to be built on the divine revealed law; though that expressly assigns incontinence as a cause (and indeed the only cause) why a man may put away his wife and marry another.] Adultery was therefore, with us, [only a cause of separation from bed and board.] But though this divorce could not be obtained in the regular course of law, on the ground of adultery, yet it was very frequently granted on that ground, by a private act of Parliament; it having become the practice of the legislature to exercise its paramount authority in this manner, by way of extraordinary relief to the injured party.

By the new Divorce Act, however, this former stat. of the law has been just subjected to changes of a fundamental and most important character. Not only has the jurisdiction of the Ecclesiastical Courts in causes matrimonial been taken from them and transferred to the new Court for Divorce and Matrimonial Causes, but many new provisions have been introduced into this branch of the law; the main effect of which may be summarily stated as follows. The act provides,—

1. That, in lieu of the divorce *à mensâ et thoro* the new court may decree, on the petition either of husband or wife, a *judicial separation*; which shall have all the effect that belonged to the divorce just mentioned; and that the same relief may also be obtained by petition to any judge of assize for the county in which the parties last resided together: that this judicial separation may be decreed on the ground of adultery, or cruelty, or desertion without cause for two years and upwards; and that by its effect the wife shall acquire as to property, and many other purposes, the condition of a *feme sole*.

2. That a divorce (or dissolution of marriage) may also be obtained from the new court, on the petition of either husband or wife, upon the ground where *he* is petitioner—that since the marriage she has been guilty of adultery: where the petition is on *her* part—that he has since the marriage been guilty of incestuous adultery, or bigamy with adultery, or rape, or unnatural crime (such as in the act mentioned), or of adultery coupled with such cruelty as would, with adultery, have entitled her to a divorce *à mensâ et thoro*, or coupled with desertion, without reasonable excuse, for two years or upwards. But the court is not at liberty to decree the divorce, if the petitioner has been accessory to, or connived at, the adultery, or has condoned it, or if the petition is presented or prosecuted by collusion; and shall not be bound to decree the divorce, if the petitioner has been guilty of adultery during the marriage, or guilty of unreasonable delay in the petition, or of cruelty to the other party, or of desertion or wilful separation from the other party, before the adultery, and without reasonable excuse, or guilty of such wilful neglect or misconduct as has conduced to the adultery.

3. That either on a decree for judicial separation, (on the wife's petition), or on a decree for dissolution of the marriage, an order may be made for alimony to the wife.

4. That on a decree for dissolution of the marriage, there may be an appeal to the House of Lords; but when the time limited for that purpose has expired without any appeal, or when in its result, the marriage is declared to be dissolved, it shall be lawful for either party to marry again, as if the prior marriage had been dissolved by death."

In concluding this notice, we can but repeat, that the New Commentaries of Mr. Serjeant Stephen deserve the reputation which they have gained—that the fourth edition appears to have been very carefully prepared, bringing down the law to the end of the last session of Parliament; that it is a work which will be found useful, not only to the student, but to the practitioner; that the notes alone contain very much practical matter, the value of which is enhanced by the references to the recent statutes and reported decisions; and, above all, that the work—which may be relied on for accuracy—contains an excellent summary of the law in its present state; a sure foundation, on which the student may safely build.

QUESTIONS ON STEPHEN'S COMMENTARIES.

Questions for Law Students on the Fourth Edition of Mr. Serjeant Stephen's New Commentaries on the Laws of England. By JAMES STEPHEN, LL.D., &c. 10s. 6d. London: Butterworths.

WE had almost omitted to notice this work, which, in fact, makes a fifth volume of the Commentaries, and one which to the student anxious to make himself acquainted with the contents of the New Commentaries is almost indispensable. To say the very

least, it will be found very useful, if any one reading the four volumes were to use the accompanying volume of questions, and endeavour to answer the questions on the corresponding parts of the New Commentaries. An extract will show better than any description how far the reader is likely to derive assistance from the work. The following is a portion from the chapter on *Husband and Wife*, and it comprises the questions on the parts of the text given in the extract from the New Commentaries:—

"II. For what purposes no husband and wife become, by marriage, one person in law?—p. 271.

Under what circumstances may husband and wife be witnesses for or against each other? and state the course of legislation on this subject.—p. 272.

Does the principle of identity of husband and wife extend to the *Queen*, regent or consort?—*ib.*

1. To what extent has a husband power over the person of his wife?—p. 273.

2. What interest does the husband take in the *freeholds*, of which his wife is seised, at the time of marriage?—p. 274.

By whose consent, and by what method, can a married woman pass the fee of her real property during coverture?—pp. 274, 275.

Can her husband in any way convey or charge her lands for a period longer than his own life?—p. 274.

What interest does the husband take in the chattels *real* of which his wife is possessed at the time of marriage, or which come to her afterwards?—p. 275.

What interest does the husband take in the *personal* chattels of the wife belonging to her at the time of marriage or accruing to her during coverture; and is there any exception to the general rule?—pp. 275, 276.

What is the effect of the recent provision, as to the disposition by a married woman of her future or reversionary interest in personal estate?—p. 276.

What are meant by a wife's *paraphernalia*; and show how she has recently been protected, in the case of her desertion by her husband?—*ib.*

State some other compensatory provisions, made by the law in favour of the wife.—pp. 276, 277.

3. In what transactions may a wife act independently of her husband?—p. 277.

To what extent can a wife bind her husband or herself by contract?—*ib.*

Can a wife accept an estate during coverture?—*ib.*

To what extent is her husband bound to provide her with necessaries?—pp. 278, 279.

What effect on the position of the wife, has the attainder and transportation of her husband for felony?—p. 279.

What privileges does a woman's coverture procure her?—*ib.*

Under what circumstances does it protect her from criminal prosecution?—p. 280.

How is the relation between husband and wife, modified by the courts of equity?—pp. 280, 281.

How can a woman be protected in the enjoyment of property granted to her sole and separate use?—pp. 281, 282.

If the wife, during coverture, becomes entitled to any equitable property not settled to her sole and separate use, under what conditions will the courts of equity assist the husband in pursuance of his claim?—p. 281.

Can a wife sue or be sued by her husband in the courts of equity?—*ib.*, p. 282.

What exception is engrafted by the courts of equity, in favour of married women, on the general rule of law invalidating restrictions on alienation?—p. 282.

What is *pin money*?—p. 283.

What limitation is called a *strict settlement*?—*ib.*

What is the distinction between *ante-nuptial* and *post-nuptial* settlements? and what was enacted by 13 Eliz. c. 5, as to the claims of creditors against the latter?—pp. 283, 284.

What is the usual form of an arrangement for separation?—pp. 284, 285.

III. What two species of divorce existed prior to the new Divorce Act passed in 1857—for what grounds were they respectively obtained, and by the sentence of what tribunals?—pp. 285, 286.

Was adultery, before the act above referred to, ever ground for annulling the marriage itself?—pp. 286, 287.

What is *alimony*? and by what other name is it known?—p. 286, *et n.*

By the new Divorce Act, what important transfer of jurisdiction has been made?—p. 287.

What sentence is substituted by that act, for that of divorce *à mensâ et thoro*?—*ib.*

On what grounds may the sentence of judicial separation be pronounced, and by the sentence of what court or courts?—*ib.*

In what manner, and on what grounds, may a dissolution of marriage be now obtained?—p. 288.

Is there any appeal from a decree dissolving marriage?—*ib.*

BRANDT ON DIVORCES.

A Treatise on the Law, Practice and Procedure of Divorce and Matrimonial Causes, containing the Act. Also, the rules, orders, and forms issued thereunder, together with Precedents. By WILLIAM BRANDT, of the Inner Temple, Esq., Barrister-at-Law. Butterworths, Fleet-street: 7s. 6d.

MR. BRANDT has produced a book which will serve well to initiate that branch of the profession hitherto unused to the work into the mysteries of matrimonial rights and remedies. Perhaps, it is as well that he is not of the now-unveiled Commons. He has read the act with eyes undimmed with the mists of that learned body. It seems to us that he has endeavoured to understand the act himself, and has then sought to enlighten others. Perhaps, this is the best class of authors. At all events, the views which he takes and expounds are such as rise to the mind, in a doubtful shape, of the enquiring professional. We have tested the book in actual practice, and found excellent help from it. This is what is

wanted in practical books. Something to work with. For example: an equity man is startled by seeing on his table, papers headed in a strange way, "In the Court of Divorce—to settle petition for restitution of conjugal rights." He reads the papers, and they read glibly enough, for there is much that is amusing as well as painful in these delicate matters, and he gets to the end of them as quickly and with the same relish as one does with some wickedly racy case of the kind from the newspapers. But then comes the stinging question. How is he to settle a petition about all this? He rushes to a book by a civilian, and there he finds a "libel" for restitution of conjugal rights, containing all sorts of queer matter, reading drolly enough, but there is no hint how to frame a petition in place of a "libel," and he asks himself is there any book upon "Petition *vice Libel*?" for the civilian appears to think he should disclose too much if he furnished a form of useful pleading instead of an exploded one. Right glad were we to find a good form of the very thing, at p. 202 of Mr. Brandt's work, and we confess that by simply making the necessary alterations of name, &c., and putting the word "refused" into the antepenultimate line of the fourth paragraph, the petition stood before us in a comfortable shape for settling—quite relieved from the questionable guise of a libel. We also see that there is help for other matters as well as in the matter of the petition we were so alarmed at, and that the book will do good service to the solicitor as well as to the barrister in the new department of law confided to them.

SUMMARY OF DECISIONS.

EQUITY AND CONVEYANCING.

ACCOUNTS.—*Opening—Company—Manager and director—Lapse of time—Death of manager—Aequiescence or laches of shareholders.*—The accounts of a manager of a public company (who was also a director) were (after the death of the manager) directed to be opened back to the year 1825, although they had been presented half-yearly to the general meeting of the company, and the shareholders had forborne, during this period, to press for an investigation, upon the representation of the manager that it would be impolitic to give publicity to the state of their concern, as being likely to lead to the establishment of a rival company. *Stainton v. Carron Co.*, 30 Law Tim. Rep. 299.

ADMINISTRATION.—*Intestacy—Administration by the Crown—Liability of the Crown to pay interest to a successful claimant.*—Where a person dies intestate, as is supposed, without any next of kin, the Solicitor to the Treasury is usually deputed by the

Crown to take out administration; when this is done it is the same as where a person entitled to administer is abroad, and appoints an agent or attorney to administer for him in this country, in which case whenever a person so authorised chooses to come to this country and administer, although the administration already granted is then determinable, yet as long as it remains unrevoked, the agent, as to claims of third parties, is administrator in the same manner as if he had administered in his own right. The same principle applies to the Crown's nominee. Where the Crown administers to the estate of an intestate through the Solicitor to the Treasury, and the whole estate is handed over to the Queen's Proctor, if (many years after) a person substantiates a claim, the crown is liable not only to repay the principal, but to pay interest at £4 per cent. If administration is taken out by power of attorney, although that is determinable by the principal afterwards administering; still, as long as it is unrevoked, the agent, as to claims of third persons, was as much administrator as if he administered in his own right. The Crown is not bound to administer to an intestate's estates. The case of the Crown administering to an intestate's estate by its nominee is the same as an ordinary administrator who hands over funds to a claimant on an indemnity. Where an executor or administrator employs the money of the estate he represents, in trade, he is liable to account for and to pay the profits realised, or to pay interest at £5 per cent., but where he is not in trade and the money is simply unduly retained, interest at £4 per cent. will be charged. An executor or administrator is bound to invest money not immediately applicable, held by him in his representative character, in £3 per cent. consols. *Edgar v. Reynolds*, 6 Week. Rep., 404.

AGENTS. — *Merchants' Accounts* — *Del credere commission* — *Credit* — *Transfer of accounts*. — Where a mercantile firm in England borrows money of another firm, and both have a common agent abroad, if the agent credit the lending firm with sums received for the borrowing firm, in pursuance of an agreement between them, that credit is not a payment. If an agent, in anticipation of the receipt of the amount of sales for his principal, remit such amount, and the purchasers fail to pay, it is not the loss of the agent, but the loss of the principal; contra if the agent sells on a del credere commission. The transfer from one account to another in the books of an agent is not payment as between the agent and the transferee of such account, and the entry is not an acknowledgment unless the transferee is informed of the fact. *McLarty v. Middleton*, 6 Week. Rep. 379.

APPORTIONMENT. — *Dividends* — *Shares in a joint stock company* — *Time of apportionment* — *Profits*

on sale of new shares. — The intention of the Apportionment Act, the 4 & 5 Will 4, c. 22, is not only to rectify the defects of the previous statute of Geo. 2, but to make a general apportionment, so that all payments, whether rents, dividends, moduses, &c., should, where there was a limitation to one for life, with remainder in fee, be apportioned between the representatives of the tenant for life, and the person entitled in remainder, supposing the life estate determined during the half year. The language used has given rise to a great deal of argument, and it is clear that the language, taken strictly, does not express what was intended. The words "made payable and coming due at fixed periods under any instrument made after the passing of this Act," must be held to apply to payments other than those previously mentioned and enumerated, that is to say, other than all rents-charge and other rents, annuities, pensions, dividends, moduses, and compositions, for the clear reason that amongst the payments specified were moduses, which could not possibly arise under an instrument made after the passing of the Act. Therefore, in order to make sense of the language, the words "made payable and coming due," &c., can apply only to payments other than rents, moduses, annuities, &c. If so, the result follows, that if there is an annuity which was not created by an instrument, whether deed or will, made since the date of the Act, but settled by an instrument in which there is a limitation to one for life, with remainder over, that would be apportionable; but if there is any payment other than an annuity, &c., in order to make that apportionable, that must be created by an instrument made after the passing of the Act, which certainly was not the intention. What was expressed to be the intention of the Act was, that "all rents, &c., payable and coming due, &c., shall be apportionable," but the language excludes all payments other than annuities, &c., under any instrument executed after the passing of the Act. The necessary conclusion therefore is, that rents, &c., do not come under the words "other payments." Accordingly, V. C. Kindersley has decided that dividends on shares in a joint stock Company are within the terms of the Apportionment Act, 4 & 5 Wm. IV. c. 22, and are apportionable; but that an additional payment by way of per centage on a profit is not apportionable under that Act, whether regarded as capital or income. *Hartley v. Allan*, 6 Week. Rep. 407; 31 Law Tim. Rep. 69.

BANKER AND CUSTOMER. — *Assignment of security* — *Notice.* — If a customer borrows money from his bankers, and gives a bond to secure its repayment, and the balance upon the general banking account is afterwards in favour of the customer, a right to set off such balance against the amount due

on the bond exists both at law and in equity. But if the firm is altered, and the bond is assigned by the original obligees to the new firm, with notice of the assignment to the obligor, and the balance upon the general banking account is afterwards in favour of the customer, then no right of set-off exists at law; but in equity the customer is entitled to set-off the balance due on the banking account against the amount due on the bond. So, if the bond is assigned to a stranger, without notice to the obligor, the same right of set-off exists, and the assignee takes the assignment subject to all the equities which affected the assignors. A change in the title of the account in a customer's pass-book is notice of a change in the constitution of the firm with which he is dealing, and the customer is affected by all the consequences resulting from such notice. *Cavendish v. Geaves*, 3 Jur. N. S. 1086.

CHOSE IN ACTION.—Assignment—Bankruptcy—Notice—Priority.—It was a general opinion that as an adjudication of bankruptcy duly advertised is considered as notice to all the world, it would be notice to trustees who held reversionary choses in action of the bankrupt, so as to prevent a subsequent particular assignee, without notice of the bankruptcy, gaining priority by giving actual notice to the trustees before the bankruptcy assignees gave such notice; but, *Sowerby v. Brooks* (4 B. & Ald. 523), shows that this was erroneous, and as does also the following case, where it was argued that, although *re Atkinson* (2 De G. Mac. & G. 140), decided that the title of an assignee, for value, was not affected by a previous insolvency of the assignor, of which the assignee, for value, had no notice, and that, unless notice were given the assignee in insolvency would be in no better position than any other claimant, yet that the case of bankruptcy was different. In *Dearle v. Hall* (3 Russ. 1), it was held, that with respect to a chose in action in the possession of trustees, the assignee must do everything towards having possession which the subject admitted; "he must do that which is tantamount to obtaining possession, by placing every person who has a legal or equitable interest in the matter, under an obligation to treat it as your property. For this purpose you must give notice to the legal holder of a fund; in the case of a debt, for instances, notice to the debtor, is, for many purposes, tantamount to possession." In *Milford v. Milford* (9 Ves. 87), it was held that the assignment in bankruptcy did not place the assignee in any other position than that of the bankrupt, and that it did not put the assignees in possession of a chose in action. In fact, they are compelled to come to a court of equity, and are therefore bound by its rules as to the administration of this species of property. This has a very strong bearing upon the

remarks of Lord St. Leonard in *re Atkinson* (*supra*), as to the assignee in insolvency representing the insolvent, standing in his place, taking only such interest as he could give, and subject to all the equities by which the insolvent was bound. It is to be observed, that the Insolvent Act there referred to (7 Geo. 4, c. 57) vested in the assignee all the estate and interest of the insolvent of whatever kind of description in the fullest way; nor did it appear that any further effect could be given to the assignment. There is nothing in the distinction frequently urged, as to the assignment in bankruptcy being an involuntary act. In the following case it was decided that *Dearle v. Hall*, and the doctrine there laid down as to notice, applies to assignees in bankruptcy, with as much force as to any other assignees. It appeared that subsequently to his bankruptcy in 1810, A. assigned a reversionary interest, to which he was entitled, to a purchaser for value, who had no notice of the previous bankruptcy, and gave the trustees immediate notice of the assignment in his favour, the trustees having received no notice of the bankruptcy: Held, that the title of the assignee, for value, must prevail over the prior title of the assignees in bankruptcy, who had not served the trustees with notice. Held also, that a conversation deposed to by the bankrupt 47 years afterwards, between himself and one of the trustees, as to his affairs, from which it was sought to affect the trustees with notice of the bankruptcy, was not sufficient evidence of notice to deprive the assignee for value of his right. *Re Barr*, 6 Week. Rep. 424.

DECREE.—Effect of, where not final—Judgment debt—1 & 2 Vic. c. 110.—To give effect to a judgment at law, as a charge on the debtor's estate, it must be not merely interlocutory, but final, for the payment of a specific sum of money upon which nothing else is to be done than to compute interest, and in respect of which, the creditor has a right actually to receive the money. A decree of a court of equity stands on the same footing as a judgment at law, therefore whenever a court of equity decrees a duty to be performed, money to be paid, or a thing to be done, that decree stands on as high a footing as a judgment at law; but this is not the case where the decree is not analogous to a judgment at law, as shown by the following decision, where a decree having declared that a defendant was liable to make good to an estate which was being administered in another suit a specific sum with which he was charged: it was held such sum is only an item in account, and although such a decree does not reserve further directions, it is not final so as to create a judgment debt. And further, that a decree which orders an account against a defendant's estate and directs the plaintiff to go in and prove the amount found due by

a previous decree, and continues the account, does not operate so as to create a judgment debt. *Garner v. Briggs*, 6 Week. Rep. 378.

DISTRICT BOARD OF WORKS.—*Metropolis Local Management Act (1855)*—*Power to close cesspools*—*Appeal clause*—*Jurisdiction*.—A district board of works came to a resolution, that no cesspools should be allowed in their district, but that other contrivances should be substituted; and in pursuance of that resolution they entered on certain lands, in order to make the required alterations: Held, first, that they have no power to act on such a general rule, but ought to exercise their discretion in each case. Secondly, that appeal given by the 112th section of the *Metropolis Local Management Act* to the Metropolitan Board of Works did not oust the jurisdiction of the Court of Chancery when any local board had exceeded their powers. *Tinkler v. The Wandsworth District Board of Works*, 6 Week. Rep. 390.

DOWER.—*Declaration barring deed not executed by husband*—*Dower Act*.—In order to prevent a widow from having dower out of lands purchased by her husband, a declaration contained in the deed of conveyance that she shall not be dowable is sufficient, and the deed need not be executed by the husband. *Fairley v. Tuck*, 3 Jur. N. S. 1089.

EQUITABLE WASTE.—*Ornamental timber*.—In the case of woods or plantations standing upon property which has been acquired by various purchases at different periods, the fact of the purchaser not having cut down the woods is not sufficient of itself to lead to the inference that they were left standing for ornament. Some act is necessary to show the intention of the purchaser in such a case to impress an ornamental character upon the timber. *Halliwell v. Phillips*, 6 Week. Rep. 408.

LEGACY.—*Leaseholds*—*Assent*—*Liability of specific legatee of leasehold*—*Assent of executor to the legacy*—*Creditor's suit*.—When an executor assents to a specific legacy of leaseholds, and puts the legatee into possession, the assent must generally speaking be considered as amounting to a release by the executor of his right to call upon the specific legatee for contribution and indemnity. The plaintiff in a creditor's suit cannot claim to make the specific legatee liable for payment of his debt, there being no averment in the bill, and no evidence to prove that the testator's general estate is insufficient to meet the demand. *Davies v. Nicholson*, 6 Week. Rep. 381.

LEGACY.—*Lapse*—*Substitution*—*"Heirs"*—*Next-of-kin*.—A substitutional gift to the heirs of a legatee who dies in the testator's lifetime, goes to the next-of-kin of the deceased legatee, and not to his personal representatives. *Re Porter's Trusts*, 27 L. J. Ch. 196.

LIFE INSURANCE.—*Policy*—*Charge on subscribed capital*—*Winding-up Acts*—*Official manager sued*.—The winding-up Acts of 1848 and 1849 do not affect the remedies of creditors, but expressly reserve them by the 58th section of the first act. The only fetter imposed is, that no proceedings can be taken at law (which extends to equity also) until proof of a debt has been made under the winding-up. The object of those statutes was not to deal with the rights of creditors, but to enable the parties to get contribution among themselves. The cases of *Thompson v. Norris* (5 De G. & Sm. 688) and *Talbot's case*, are instances of proceedings by creditors after a winding-up. The 20 & 21 Vic. c. 78, does indeed fetter the suits of creditors, by requiring them, first, to obtain leave of the court, but this is only to take effect in the event of proceedings having been taken to appoint a representative. In the following case it appeared that a life policy was effected, containing a clause to the effect that the payment of the sum insured should be a charge on the stocks, funds, and property of the company, and a proviso that shareholders should not be liable beyond the amount unpaid on their shares: Held, that the charge included the capital subscribed for, but not paid up. The company having been ordered to be wound-up, but no advertisement having issued for the appointment of a creditor's representative under 20 & 21 Vic. c. 78: Held, that the insured was entitled to effectuate his charge by a suit against the official manager. *Robson v. Creight*, 6 Week. Rep. 385.

MORTGAGE.—*Equitable*—*Priority* [*ante*, pp. 262, 297]—*Original conveyance not deposited*.—The following decision may be added to the cases of *Perry v. Attwood* (*ante*, p. 262), and *Carter v. Carter* (*ante*, p. 297), respecting priority being lost by the neglect of a mortgagee to obtain the title deeds. A. to secure a loan, deposited with B. title deeds relating to an estate, but not the deed of conveyance to himself, and signed a memorandum of deposit, which represented that these were all the deeds. A. afterwards deposited with C., who had no notice of B.'s claim, the conveyance to himself, and duplicates of some of the earlier deeds, and also signed a memorandum of deposit as to this loan: Held, that B. was entitled to priority. *Roberts v. Croft*, 27 L. J. Ch. 220.

MORTGAGE.—*Assignment of debt without the security*—*Foreclosure*.—A mortgage debt may be parted with without losing the right to foreclose in respect of the security. At least, it has been decided that a mortgagee who has assigned his mortgaged debt, expressly reserving to himself the benefit of the mortgage security, is entitled to the common foreclosure decree. *Re Morley*, 6 Week. Rep. 360.

PARTNERSHIP.—*Mines—Interest of surviving partners—Renewal of lease—Legatee of deceased partner—Acquiescence and delay.*—The general rule of law is that, on the death of a partner his representative is entitled, in the absence of express stipulation to have the whole concern wound up and disposed of; and if the surviving partner continue the trade, the representative of the deceased partner may elect to take his share of the profits, or charge survivor with interest on the capital retained. If the property consist in part of leaseholds, the representative of the deceased may treat the survivor as trustee, and if the survivor renew the lease he is considered to do so for the benefit of the partner. This rule is subject to qualification where the trade is one of a speculative character, requiring outlay with an uncertain return. In such case, if the surviving partner continues it in his own name, renewing a lease, &c., the representative of the deceased partner will take no interest unless he is ready to contribute. But where a surviving partner in a mine continued to work it, and obtained a renewal of the lease, but did not communicate that fact or render any account to the representative of his deceased partner, though asked for information, the court declared, after the lapse of six years, upon bill filed by the legatee of the deceased partner, that his interest continued in the partnership for the benefit of the estate, leaving the terms on which he was to take such benefit to be settled afterwards. *Clemants v. Hall*, 6 Week. Rep. 358.

POWER.—*Appointment to persons not object of power—Fraud on power.*—It is well established that a device by which it is attempted to authorize the donee of a limited power to appoint to persons not the objects of the power is void. And in the following case it was decided that an appointment to an object of a power in pursuance of a bargain that he shall hold in trust or partly in trust for persons not objects of the power is void, whether any benefit be or be not stipulated for by the appointor. *Re Birkly*, 6 Week. Rep. 400.

PUBLIC COMPANY.—*Contract by directors ultra vires—Specific performance—Misrepresentation.*—Although it is established that courts of equity will compel defendants to make good their representations, this cannot be applied to cases where it is impossible to make them good. Where directors of a company engage that their company will do certain acts (which are in fact *ultra vires*), there is no equitable relief against the directors personally, either by way of specific performance, or on the misrepresentation. The remedy in such a case is by an action for damages. *Elles v. Coleman*, 6 Week. Rep. 360.

PUBLIC COMPANY.—*Joint stock company—Winding-up—Shareholders—Untrue representation—*

Agency on behalf of company.—A distinction exists between representations made by persons interested in a company, and representations made by the company itself and its agents. It is certain that if a person be drawn in to join a company by the representations of an individual member of such company, he is not exonerated from liability to the company; his remedy, if any, is against the person who deceived him. Great difficulties exist in regard to the effect to be given to representations made by a company or its agents. It has been decided that persons led to become parties to an undertaking by false or fraudulent representations in a *prospectus* and who, with full knowledge of the fraud, continue members of the company and act as such, cannot claim exemption from liability. In the following case, three persons became shareholders in a company on a representation, not fraudulently, but as the event proved, untruly made, by the solicitor and another, who was a promoter of the company, that two men of wealth would become shareholders. The Lords Justices held, that having signed the deed without inquiry as to the truth of the representation, and continued to act as shareholders after they discovered its untruth, they were properly made contributories. *In re The Hull and London Fire and Life Insurance Company*, 6 Week. Rep. 384.

PUBLIC COMPANY.—*Winding-up Acts—Banking Act—Injunction—Creditors.*—Where a creditor of a company sues them for his debt, and, by arrangement, gets a judge's order for payment or judgment, in default of payment, the court will give him the benefit of such judgment, but will restrain execution on such judgment without the leave of the court or judge in chambers. Whether such judgment creditor would have priority under the 75th section of 19 & 20 Vic. c. 47, as in an administration suit, *quære*. But whatever rights are conferred by that section, the creditor in this case was entitled to liberty to apply in the winding-up as to costs. *In re The Northumberland and Durham District Banking Co.*, 6 Week. Rep. 454.

SOLICITOR AND CLIENT.—*Costs as election agent—Taxation—Retainer.*—A solicitor who was employed as an election agent, and who advised and assisted the committee: Held to have been retained as a solicitor and not as a mere agent, and to be liable to have his bill taxed accordingly. *Re Osborne*, 6 Week. Rep. 401.

SURETY.—*Bond conditioned for payment of the balance due on a banking account—Construction—Limitation of the surety's liability—Advances made to principal in excess of agreed amount.*—Where a bond entered into by a surety recites an agreement to give credit for a particular sum, and the condition is for securing that amount, it is well established by the

judgment in the case of *Parker v. Wise* (6 M. & S. 245), that unless the bond clearly shows that the parties intended that the restriction was to operate as a condition upon which the whole security was to become void, the advancing to a greater amount would be no defence; and the judgments in that case are strongly in point to show how unlikely and improbable such an agreement is, so that strong expressions of intention ought to be found before such a condition can be construed to arise, which would make the whole bond void upon a shilling being advanced beyond the stipulated amount. So also the cases cited in *Parker v. Wise*, from the equity courts, show that it is not against equity to advance further than the stipulated amount in such cases. Accordingly, in the following case, the Court of Queen's Bench decided, that if a bond be given by one as surety to secure the payment of advances made by a banker to his customer, the bond is not altogether avoided as against the surety by the banker advancing beyond the agreed amount, unless it clearly appear by the instrument that such was the intention of the parties; but the liability of the surety is limited to the agreed amount. And where the defendant had as surety executed a bond conditioned for the payment of any balance due from the principal not exceeding £1000, together with interest thereon, but had consented to do so upon receiving from the banker a memorandum that the advance to the principal was to be limited to £950, and that the surety was to be informed if the amount with interest should reach £1000, and not be reduced within one month: Held, upon the construction of this memorandum and the correspondence between the parties, that the only effect of it was to limit the liability of the surety in point of amount, and that a violation by the banker of the stipulations contained in it afforded no defence, either at law or upon equitable grounds to an action against the surety upon the bond. *Gordon v. Rae*, 31 Law Tim. Rep. 55.

TRUSTEE.—Charging for executing trusts—Auctioneer—Auctioneer's commission—Trustee entitled to charge same against estate.—Though it is a rule that a trustee cannot make any profit by the performance of his duties, yet it is clear that the creator of the trust may enable him to make charges for his labour. By a deed made between plaintiff and defendant, the latter assigned to the former timber and stock-in-trade upon trust, to sell, and "to apply the money arising from the sale, amongst other things, in paying the expenses of preparing for, making and completing such sale or sales, including the usual auctioneer's commission, and otherwise incidental to the aforesaid trusts." The plaintiff was himself an auctioneer, and had been on former occasions em-

ployed in that character by the defendant. The bill was filed, praying an account, which the Master of the Rolls directed, ordering also that the plaintiff should be allowed the usual charges for commission as auctioneer. From this order defendant appealed: Held (confirming his Honour's decision), that the words in question could only have been inserted in the deed to provide for the case of the plaintiff himself acting as auctioneer, and consequently that he was entitled to charge the usual commission for selling the property, the amount to be settled in chambers. *Douglas v. Archbutt*, 31 Law Tim. Rep. 4.

TRUSTEE.—Appointment of New—Old trustee dead and no representative—The Trustee Acts—Appointment by the Court.—Where a surviving trustee has been dead for many years, and no administration has been taken out to him, and there is therefore no existing trustee, the Court will appoint a new trustee upon petition, under the 32nd section of the Trustee Act of 1850, and in the 9th section of the Trustee Extension Act of 1852. In such a case it is expedient to appoint a new trustee, but it cannot be done without the aid of the court, which therefore brings the case within the statutes. *Davis v. Chanter*, 6 Week Rep. 416.

WILL.—Memorandum—Codicil—Incorporation.—A. executed his will in February, and a codicil on the same paper in December; below the signature to the will, and before the commencement of the codicil, there was a memorandum deposed by the drawer of the will to have been written on the paper before the execution of the will: Held, that as the codicil referred merely to the will, such memorandum was not entitled to probate. *Re Willmott*, 6 Week Rep. 409.

WILL.—Construction—Annuity out of fund becoming deficient—Residuary gift—Payment of deficiency.—The following case is a specimen of litigation, having been before the Master of the Rolls, the Lords Justices and the House of Lords. It turns on the effect of a direction in a will to set aside a fund, raisable in a particular manner, sufficient to pay a certain amount, and it happens that the fund so raised is not sufficient to realise an annuity of the specified amount. A testator gave the produce of his real and personal estate to a trustee upon trust thereout to invest such a sum of money as, when placed out and invested, interest thereof should realise the annual sum of £200, and should pay the income to the testator's wife during her life or widowhood; and after her death or second marriage he declared that his trustee should stand possessed of the said principal sums or trust money in trust for the testator's brothers and sisters equally; and as to the residue of the trust monies arising from the sale of his real and personal estate, after raising thereout the money sufficient to realise the annuity

for his said wife, the testator declared that it should be in trust for his brothers and sisters equally. The whole of the proceeds were insufficient to produce an income of £200 a year: Held, that the widow was not entitled to have the deficiency of her income made good out of the corpus of the fund. *Baker v. Baker*, 6 Week. Rep. 410.

WILL.—Omission of name—Rectification—Administration—Debts—Liability of lands specifically devised—§ 4 Will. 4, c. 104.—A testator having six children makes a specific devise to each of them by name. In a subsequent part of this will he makes a specific gift to two of them, A. and B., and gives the residue of his estate "to his said four children," mentioning only C., D., and E.: Held, that the name of the omitted child, F., ought to have been inserted, and that F. was entitled to one-fourth of the residue. Where a testator's personal estate is insufficient for the payment of debts, and there is no direction as to the payment of debts in the will, the real estate specifically devised, as well as that comprised in the residuary gift, must contribute rateably with the personal property specifically bequeathed in payment of such part of the debts as remains unpaid. *Eddels v. Johnson*, 6 Week. Rep. 401.

WILL.—Construction—Gift to one for himself and family—Trustee Act—Costs.—Where there is a gift by will to a person "for the maintenance or support of himself and his family," such gift is not clothed with any trust; but the legacy having been paid into court under the Trustee Relief Act, the court will order payment to the legatee in the words of the bequest; costs out of the fund. *Re Robertson's Trust*, 6 Week. Rep. 405.

WILL.—Construction—Conversion—Public stock—Long annuities.—Where a testator directs the sale and conversion of all his property except such portion as consists of money in the public funds, and directs the proceeds to be invested, that direction does not apply to long annuities. *Howard v. Kay*, 6 Week. Rep. 361.

WILL.—Gift to Executors—Resulting Trust.—In the following case, where there was a gift in trust, with trusts not fully exhausting the property, it was held that the trustee was entitled beneficially. The testator gave and bequeathed all his residuary estate to his wife, "upon trust," to pay thereout an annuity, and, "upon further trusts," to pay certain legacies which did not exhaust the personal estate. He referred to his wife as his executrix in the will, but the will did not contain any express appointment of her as executrix: Held, upon the construction of the will, that she was entitled beneficially to the surplus estate. *Williams v. Roberts*, 27 L. J. Ch. 177.

WINDING UP.—Joint stock company—Petitioner out of jurisdiction—Security for costs.—Where a

petition is presented to wind up a joint stock company in bankruptcy under the provisions of the Joint Stock Companies Acts, 1856 and 1857, by a party who is resident out of the jurisdiction, the court will, on the application of the respondents, order the petitioner to give security for costs to the amount of £100, and will order the hearing of the petition to stand over generally, with liberty to the petitioner, upon giving such security, to apply to have another day appointed for the hearing. *Ex parte Hobbs v. The Electric Power Light and Colour Company (limited)*, 31 Law Tim. Rep. 27.

EQUITY PRACTICE.

ADMINISTRATION SUMMONS.—Decree for wilful default—20th Order of the 16th October, 1852.—The following decision shows the unwillingness of the courts of equity to extend the effect of the summary proceedings for administration so as to charge a representative with wilful default. It may be observed, that, where a bill is filed for a common account, a defendant cannot be made to account for that which, but for his wilful neglect or default, he might have received. To obtain a simple account of what an executor or administrator has received, it is not necessary for a plaintiff to insert any special allegation with respect to receipt of the personal estate; it is sufficient that the defendant is executor or administrator. However, it is settled, that to get any other decree, a plaintiff must allege that there is something which the defendant might have received, but did not receive. In prosecuting an ordinary decree for an account against an executor or administrator a plaintiff cannot charge a defendant with anything but actual receipts, nor can he be permitted to show that some part of the estate ought to have been got in, however culpable the defendant may have been. Any such attempt would be peremptorily and instantly rejected. It is not material whether the plaintiff knew of special circumstances, or only discovered them by taking the account. This rule applies, not only to an executor being made to account for that which, without his wilful default, he might have received, but to the charge of any misconduct with respect to the personal estate or to any breach of trust. Charges of this kind must be alleged by the bill, and proved at the hearing, but cannot be introduced in taking the accounts; and, on further directions, the defendant is precluded from getting an order—the only question that can be made is, whether a defendant ought to have been made liable for interest on balances improperly retained; but the plaintiff has no remedy as to wilful default in that suit. If a plaintiff discovers wilful default or misconduct, he must file a supplemental bill, adapted to the purpose, being a bill of

review. These rules are equally applicable to claims; and, until 15 & 16 Vic. c. 86, there was no mode, except by bill or claim, to take such accounts. That statute, by the 54th section, gave a remedy by *summons in chambers*, providing that the usual order should be made for the administration of the estate, with such variations, if necessary, as the circumstances required, such order having the force and effect of a decree made on the hearing. The 20th Order of Oct. 1852, provides, that if in the prosecution of an order it should appear to the judge that it would be expedient that further accounts should be taken or further inquiries made, he may order the same to be taken and made accordingly; or, if desired by any party, may direct the same to be considered in open court. *V. C. Kindersley* has decided, that, where an estate is being administered by *summons in chambers*, it is not competent to the plaintiff to obtain anything but the usual decree, under which he cannot charge the defendant with wilful default or other misconduct. The 20th Order of the 16th October, 1852, does not empower the judge in chambers to make any variations inconsistent with the decree, whether on bill, claim, or *summons in chambers*. *Partington v. Reynolds*, 6 Week. Rep. 388.

CHAMBERS, PRACTICE IN.—*Creditor's summons—Adjournment into Court.*—A creditor's summons was taken out in chambers in a cause. Upon the return of the summons, the chief clerk, finding that he had no jurisdiction, adjourned the summons into court at the suggestion of all parties, to come on with the cause, upon further consideration: Held, that the application by summons was regular, but that it ought to have been referred to the judge in chambers, and not adjourned into Court. No order was made upon the summons, the claim being barred by the Statute of Limitations, but the plaintiff was ordered to pay the creditor £5 for his costs, and to add them to his own. The costs of all other parties, costs in the cause. *Halliley v. Henderson*, 31 Law Tim. Rep. 9.

EVIDENCE.—*Cross-examination of party to suit—Costs of witness.*—The costs of a witness summoned to attend a cross-examination, whether he be a party or a stranger, must be tendered to him by cross-examining party before he is brought up for cross-examination. *Davey v. Durrant*, 6 Week. Rep. 405.

EVIDENCE.—*Viva voce examination at the hearing*—15 & 16 Vic. c. 86, s. 39.—Where the case on both sides has been concluded, and the court itself desires further evidence for its own satisfaction, the matter in issue, as stated in the bill, should be placed before the witness, the particular passage marked; the witness's affidavit relating to it should be given

to him, and he should be informed that as to that further examination is desired. *Semble*, the 39th section of 15 & 16 Vic. c. 86, applies only to witnesses who have given evidence in the cause. *The East Anglian Railway Company v. Goodwin*, 31 Law Tim. Rep. 55.

INTERPLEADER.—*Joint owners of sold ship—Costs on lower scale.*—Where two parties claim a right to a vessel which has been sold, and part of the proceeds is in the hand of a third party, in the form of a bill of exchange, that is a case for interpleader. The lower scale of costs applies to a bill of interpleader where the matter in dispute is under the value of £1000, under the 7th rule of the 2nd Order of 30th of January, 1857. *Gibbs v. Gibbs*, 6 Week. Rep. 415.

PRODUCTION OF DOCUMENTS.—*Relating solely to plaintiff's title—Not evidencing defendant's title—Protection.*—The following is a decision, following out preceding cases, to the effect that documents relating exclusively to the plaintiff's title are not subject to production on the request of defendants not having any title evidenced thereby. It appeared that an injunction had been obtained restraining the defendants, whose title to the surface land was admitted, from interfering with or working certain mines claimed by the plaintiffs. Upon a motion by the defendants, for production of documents in the plaintiff's possession, the plaintiffs stated, in their affidavit in opposition, that the documents in question showed the title of themselves and other defendants in the same interest to the mines and minerals exclusively, and that none of them in any manner showed that the defendants applying had or ever had any estate, right, title, or interest, in the mines or minerals: Held, that these documents were entitled to be protected from production. *Lloyd v. Purves*, 6 Week. Rep. 421.

SECURITY FOR COSTS.—*Wrong description of plaintiff—Waiver applying for time to answer.*—Where the statement of the plaintiff's residence on the face of the bill is not such as to entitle the defendant at once, without further proof, to move for security for costs, his right is not prejudiced by applying for time to answer, having been upon that occasion first led to a knowledge of the facts which entitled him to obtain security. *Swanzy v. Swanzy*, 6 Week. Rep. 414.

COMMON LAW.

ARBITRATION.—*Award, when binding—Common Law Procedure Act, 1854 (17 & 18 Vic. c. 125, s. 8).*—*Power to remit matters referred.*—Where a matter is referred to an arbitrator chosen by the parties to the reference they are bound by his award, both as to fact and law, provided his award be good

upon the face of it, and there has been no misconduct on his part. The 8th section of the Common Law Procedure Act, 1854, empowers the court to remit the matters referred to the reconsideration of the arbitrator only in cases where, before that act, the court might have remitted them, if the submission had contained a clause empowering the court to do so. *Hodgkinson v. Fernie*, 27 L. J. C. P. 66.

ARBITRATION.—*Award—Validity—Adjudication as to costs—Arbitrator—Receiver—Costs retained—Plea of nul tiel agard—What put in issue.*—Where disputes arising out of two partnerships were referred, by agreement, to an arbitrator, who was also appointed by the parties receiver of the property of one of the partnerships, and had power to get in the estate, and dispose of it as he might think best for the parties, and the costs of the reference and award were left to his discretion, the arbitrator concluded his award by certifying that he had deducted the costs of the award out of the monies which he had received as receiver: Held, per Cockburn, C. J., Cresswell, J., and Willes, J., that the award was bad, because the arbitrator had no power to fix his own fees and pay his own costs out of the money he had received, and because it did not decide by whom his costs were to be paid. Per Williams, J.: That the award was good, the arbitrator having neglected no duty in omitting to adjudicate as to the costs, which he had chosen in his character of receiver to reduce to nothing by defraying them out of the money he had in his hands as receiver. By the court: That on a plea of *nul tiel agard*, advantage may be taken of the invalidity of the award on the ground that all the matters in dispute were not determined by it. *Roberts v. Chehardt*, 27 L. J. C. P. 70.

BILL OF EXCHANGE.—*Interest at £10 per cent. after bill due.*—In an action against the drawer of a bill for £200, with £10 per cent. interest, it was held that the holder might recover interest at £10 per cent. from the time when the bill became due, as well as for the time during which it was running. *Re Keene*, 27 L. J. C. P. 88.

BILL OF EXCHANGE.—*Indorsement as distinguished from deposit as security—Evidence.*—The burden being cast upon a defendant (sued as indorser of a bill of exchange), when the indorsement has been *prima facie* proved, of showing that the delivery to the plaintiff was not with the intention of constituting an indorsement, but simply by way of deposit or security: it was held, that he did not show this merely by proving that the bill was given by drawer and acceptor to the plaintiff, as security to the plaintiff for a loan of the amount or discount, half of which loan the defendant, by arrangement with the plaintiff, was to advance to him; even although the

plaintiff so far admitted the arrangement as to claim only a moiety of the amount of the bill, such an arrangement not being inconsistent with an absolute indorsement, nor necessarily tending to disprove it. *Attenborough v. Clarke*, 27 L. J., Ex., 138.

CARRIERS.—*Railways—Duty of carriers where the consignee refused to pay the carriage—Lien—Reasonable place for warehousing goods—Right to send back goods to place of receipt—Pleading—Liability for acts done by servants of other companies over whose lines goods are conveyed—Packed parcel.*—The following case is one of much importance as to the liabilities of railway companies receiving goods to be carried. The declaration in an action for not delivering goods, contained two counts: one against the defendants, as common carriers, the other in trover. The facts were these:—The plaintiff delivered to the defendants, the Great Western Railway Company, in London, a packed parcel, to be carried to Plymouth, and there delivered to his agent, to whom it was addressed. The parcel was duly tendered at Plymouth, but the agent, disputing and refusing to pay the proper charge, the railway porter informed him, that unless it was paid the parcel would be returned to London, and, upon his still refusing, took it to the station, and early on the following day, it was sent back to London. On the same day, but after it had been sent off from Plymouth, the agent tendered the charge there, and demanded the parcel, but was told that it had been returned to London. The parcel remained at Paddington till the trial of this action, but it did not appear that any further application was made for it by the plaintiff. The jury found that the parcel had been sent back to London unreasonably soon; that, it ought not to have been sent back there; and that the demand and tender by the plaintiff's agent had been made within a reasonable time: Held, by the majority of the court (affirming the judgment of the Exchequer), that, upon the above facts and finding, the defendants had been guilty of a breach of duty, for which the plaintiff was entitled to maintain the action: Held, by Crowder, J. (differing from the rest of the court), the defendants had not, either as carriers or bailees, been guilty of any breach of duty in sending back the parcel to London; and that the plaintiff had no right of action; that the duty of the defendants as carriers terminated upon the refusal to pay the carriage; and that such refusal amounted to an unqualified refusal to accept delivery. To the count charging the defendants as common carriers, for not delivering at Plymouth, they pleaded a tender of the parcel there upon payment of the hire, and justified their refusal to deliver upon the ground that the plaintiff refused to pay. To this the plaintiff replied, that within a reasonable time after such tender he

tendered the hire, and demanded the parcel at Plymouth, and upon this issue was joined: Held, by Wightman, J. (who concurred with the majority in the result), that upon the evidence this issue was properly found for the plaintiff; but that if the defendants had rejoined specially the ground of their excuse for not delivering—namely, that upon the original refusal to pay the hire they had sent the parcel to London—upon the facts above he should have doubted their liability. *Semble*, that if a common carrier, upon refusal by a consignee to pay the carriage, insists upon his right of lien, he is bound to deal with the goods in a reasonable manner in respect of the place at which he warehouses them, and, if such place is at a distance from the consignee, in respect of the time when the goods are sent there. In the absence of special circumstances, the responsibility of a railway company receiving goods as common carriers, to be delivered at a particular place, is precisely the same whether their own line extends the entire distance or stops at an intermediate point; and railway companies, upon whose lines beyond such points it is necessary for the goods to be conveyed, as well as their clerks and servants, are to be regarded as the agents of the railway company which originally received the goods for all purposes connected with the conveyance and delivery and dealing with the goods. *Crouch v. The Great Western Railway Company*, 6 Week. Rep. 391.

CONTRACT.—*Goods sold—Evidence—Order in writing—Order to one party executed by another—Prejudice to right of set off.*—If a party orders in writing goods of a certain person, and the goods are supplied by another person, the party giving such order, at all events, if he has a set-off against the party to whom he sent it, is not, if he received and consumed the goods without notice, liable to the party sending them. *Boulton v. Jones*, 27 L. J. Ex. 117.

CONTRACT.—*Rescinding—Pleading—General breach—Plea of rescission—Evidence—New assignment.*—A plea, in an action on a contract to do several things, that the contract was rescinded before breach, even although the breach laid in the declaration is general, is to be construed as meaning that the rescission was before any breach; and, therefore, if this is not proved, the plea fails *in toto*, and there is no necessity for a new assignment. *Burgess v. De Lane*, 27 L. J. Ex. 154.

CONTRIBUTION.—*Partnership transaction—Money paid—Promissory note.*—The right to enforce contribution between joint makers of a promissory note by an action at law, is not affected by the fact, that the makers were co-partners together with others, and that the note was given to secure money raised for the purposes of the partnership. Therefore, where, A., B., and C., being shareholders with

other adventurers in a Cornish mine, conducted on the cost-book principle, for the purpose of raising money for carrying on the mine, joined in a joint and several promissory note for £500, and which being discounted, the proceeds were applied to the working of the mine, A. having subsequently paid the amount to the holder of the note: Held, that an action for money paid, was maintainable by him against the other makers of the note, this not being a partnership transaction. *Sedgwick v. Daniell*, 27 L. J. Ex. 116.

EVICTIO.—*What amounts to—Molestation and disturbance—Amendment.*—Land is mortgaged, and, subsequently, is let to a tenant who is not aware of the mortgage until he receives notice of it from the mortgagee. The tenant being advised that he cannot resist the mortgage claim, goes out of possession, and allows the mortgagee to take possession. This amounts to an eviction. Per Willes, J.: At all events, it is a molestation and disturbance. *Carpenter v. Parker*, 6 Week. Rep. 98.

EXTENT.—*Sale under—Right to accumulations of funds in court—Crown debtor—Statute 25 Geo. 3, c. 85.*—In 1802, in pursuance of an order of the court under the statute 25 Geo. 3, c. 85, the extended lands of the Crown debtor were sold for more than the amount of the Crown debt; and the debtor being a lunatic, the amount of the purchase money was, by order of the court, paid into the hands of the deputy remembrancer, and was by him invested in the public funds in the name of the Accountant-General. In 1841, by the statute 5 Vict. c. 5, the fund and accumulations were vested in the Queen's Remembrancer to attend the orders of the court. On the petition of the heir of the debtor: Held, that he was entitled to the surplus of the monies after payment of the Crown debt, interest, and costs. *In re Delamotte*, 27 L. J. Ex. 110.

LANDLORD.—*Covenant to repair—Lessor and lessee—Damages—Reversion—Measure of damages.*—The decision noticed *ante*, p. 231, may be thus concisely stated:—A lessee is entitled to recover from his sub-lessee substantial, and not merely nominal, damages, for a breach of an express covenant to repair, although, at the time of action brought, the lessee has no reversion by reason of the entry of his lessor, after such breach, for a forfeiture. *Davies v. Underwood*, 27 L. J. Ex. 113.

MALICIOUS PROSECUTION.—[*ante* p. 301]—*Evidence of want of reasonable and probable cause.*—The plaintiff was employed by H. to "dress" some timber on the defendant's premises, to be paid for by instalments, as the work proceeded. Before it was completed, H. made an assignment of his effects to the defendant. Money being due to the plaintiff, he asked permission to take some pieces of

timber away, and was informed that he could not do so. Early the next morning, and before any person was on the spot, he removed some of the timber, and placed it on his own premises, and in the course of the same day, his attorney wrote to the defendant's attorney, stating that the plaintiff had a lien for work on the timber removed, and unless the amount due for work was paid, the timber would be sold. At a subsequent interview, the plaintiff told the defendant he took the timber because he was afraid he should not be paid by H. The defendant afterwards laid an information against the plaintiff for stealing the timber, upon which the plaintiff was arrested and taken before a Justice, when he was discharged. The plaintiff having brought an action for a malicious prosecution: Held, that there was evidence of want of reasonable and probable cause. *Huntley v. Simson*, 27 L. J. Ex. 194.

NEGLIGENCE.—*Railway company—Care of the line—Obstruction—Wilful act of stranger—Evidence.*—Assuming it is *prima facie* evidence of negligence in a railway company, that a train has got off the line, such evidence is entirely rebutted by proof that the accident arose from the wilful and wrongful act of a stranger. *Latch v. The Rumner Railway Company*, 27 L. J. Ex. 155.

NEGLIGENCE.—*Action under Lord Campbell's Act—9 & 10 Vic. c. 98—Exercise of statutable powers by public companies* [see Princ. Com. L. 62].—Although, where statutable powers are conferred and exercised merely for the public benefit and in the discharge of public duties, the persons so exercising them, being in the position of trustees for the public interest, may not be liable for injuries thereby occasioned; yet, where such powers are conferred on parties partly for their own benefit and exercised for their own profit, such parties are answerable for injuries occasioned by their careless exercise of the powers so conferred. Thus, where a canal company are empowered by private act of Parliament, to intersect highways and to construct bridges to connect the intercepted portions, and the canal and bridges are vested in them as proprietors, and they are enabled to take tolls from boats passing the bridges, and they erect swing-bridges, which the boatmen are entitled to open for the purpose of passing, and which when opened leave the edge of the canal unprotected, and there is not sufficient light or other means of preventing accidents, and the consequence is, that while the bridge is lawfully opened at night-time a person falls into the canal without any fault on his part, the company will be liable to an action. *Semble*, it would be otherwise, if the boatmen, after having passed, had wrongfully left the bridge open at the time of the accident. *Manley*

v. The St. Helen's Canal and Railway Company, 27 L. J. Ex. 159.

PATENT.—*Invalid patent—Former patent—Application of known process to new purposes.*—The mere application of known machinery by the same means to some new substances is not the subject of a patent. A patent was obtained in 1856 for an improvement in finishing yarns of wool or hair. The specification stated the improvement to consist of causing the yarns, whilst distended and kept separate, to be subjected to the action of rotary beaters or burnishers, by which the yarns would be burnished or polished on all sides. A patent had been obtained in 1853 for the same improvement in finishing cotton and linen yarns by a similar process, similarly applied: Held, the patent of 1856, being merely for the application of a known process to a new article by known means could not be sustained. *Brook v. Aston*, 27 L. J. Q. B. 148.

PRINCIPAL AND AGENT.—*Foreign principal—Recovery of money paid on failure of consideration—Action, whether against agent or vendor of goods.*—In *Couturier v. Hastie* (5 Ho. Lds. 679; 25 L. J. Ex. 259) it was decided, that when goods were not in existence at the time they were contracted for or invoiced, a party who has paid money on account of them is entitled to recover it back. In the following case it was decided, that where a foreign principal orders goods of a broker here, who buys them in his own name, though the vendor knows he is acting as agent, and the broker pays the vendor the purchase money, which he afterwards receives from his principal, and it turns out that the goods were not in existence at the time of the contract, the principal cannot recover back the money paid from his agent, the broker, but must proceed against the vendor for it. *Quere*, whether the action by the principal against the vendor ought not to be brought in the name of the broker. *Risbourn v. Bruckner*, 27 L. J. C. P. 90.

PRINCIPAL AND AGENT.—*Goods sold—Evidence.*—In an action for the price of goods sold, the fact that the party who took the order from the defendant called himself a "commission agent," and exhibited the plaintiff's prospectus (there being no evidence that the plaintiff sent an invoice to the defendant, or the defendant sent any order to the plaintiff), will not be any evidence of a liability to the plaintiff. And if the party who took the order agreed that he would allow the defendant a certain discount off the prices specified, this will tend to show that the contract was with him as principal. *Burton v. Furniss*, 27 L. J., Ex., 189.

RAILWAY AND CANAL TRAFFIC ACT, 1854 [ante p. 341]—17 & 18 Vic. c. 31—*Injunction.*—The mere fact that the state of a person's trade, who

requires goods in the way of his trade to be carried by a railway company, is such that it happens not to accommodate itself to a scale and system of rates adopted by the railway company, which scale and system of rates does not appear to be disadvantageous to the public at large, or objectionable in other respects, is no ground for a writ of injunction under the Railway and Canal Traffic Act. But where the effect of a scale of charges adopted by a railway company is such as to diminish the natural advantage which the local position of certain dealers in articles, required by such dealers to be carried in the way of their trade by the railway, gives them over certain other dealers from the greater proximity of the local position of the first-mentioned dealers to certain districts in respect of the traffic at those districts, by annihilating in point of expense of carriage a certain portion of the distance between the local position of the last-mentioned dealers and the said district, this is an undue preference, and the subject for an injunction under 17 & 18 Vic. c. 31. *In re Ransome and another, v. The Eastern Counties Railway Company*, 6 Week. Rep. 395.

COMMON LAW PRACTICE.

ARBITRATION.—*Award not executed in presence of all the arbitrators.—Sending back award to be re-executed or corrected.*—When an award has been executed by one of several arbitrators at a different time and place from the others, or when any similar error has occurred, involving no misconduct in the arbitrators, or substantial injustice to the parties, the award will not be set aside, but will be sent back to the same arbitrators to be re-executed or corrected; and that course was taken even when a third arbitrator, called in by two others, had not only heard the whole of the evidence already taken read over to him, but had asked questions of the witness, without notice to, and in the absence of, the parties and their attorneys. *Semble*, there is no necessity for notice to the parties in such a case. *Anning v. Heartley*, 27 L. J. Ex. 145.

EVIDENCE ON MOTIONS.—*C. L. P. A., 1854—Power of court to direct oral examinations of witnesses.*—The 46th section of the C. L. P. A., 1854, which gives power to the court or judge, upon the hearing of any motion or summons, to order witnesses to appear and be examined *viva voce*, applies only to interlocutory applications, and the court, therefore, refused to examine a witness on the argument of a rule for a new trial. *Chapman v. The Monmouthshire Railway and Canal Co.*, 30 Law Tim. Rep. 308.

FRAUD.—*Pleading—Goods sold—Plea of fraud—Leave to reply and demur.*—The plea of fraud in the usual form to the common counts for goods sold, &c.,

is good, and leave was refused to reply and demur. *Lawton v. Elmore*, 27 L. J. Ex. 141.

INSPECTION OF DOCUMENTS.—*Common Law Procedure Act, 1854, s. 50—Action for defamation—Application by plaintiff to inspect accounts, &c., falsifying plea of justification.*—In an action for libel, where there is a plea of justification, imputing to the plaintiff dishonesty while in the employ of the defendant, the plaintiff will be allowed inspection (under the Common Law Procedure Act, 1854, sec. 50) of statements of accounts furnished by himself of monies received in the course of such employ, and of letters from himself to the defendant relating thereto, and of entries in the defendant's books of moneys received from him, so far as they may be material to disprove charges contained in the plea; or, if the plea is general, so far as they may relate to discharge specified in particulars; and the defendant will be compelled to deliver such particulars. *Collins v. Yates*, 27 L. J. Ex. 150.

INTERPLEADER.—*Order restraining action against execution creditor.*—The 1 & 2 Will. 4, c. 58, s. 6, provides, that, on the application of the sheriff, &c., the court may exercise for the adjustment of the claim, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities in the act contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case (see 2 Chit. Prac. 316, last edit.). It has been decided that a judge at chambers, on an interpleader order, has authority to restrain an action against the execution creditor, as well as against the sheriff. *Carpenter v. Pearce*, 27 L. J. Ex. 143.

PROBATE AND DIVORCE.

ADMINISTRATION.—*With will annexed to the nominee of a person having power under a will to appoint personally, the executor renouncing*—20 & 21 Vic. c. 77, s. 73.—A. bequeathed the residue of his personal estate to W., his sole executor and trustee, in trust for such persons as B., a married woman, should appoint, and in default of appointment, to B. absolutely. W. renounced. By deed B. appointed and assigned to M. and J., who accepted the trust, all her interest under the will, and her right to letters of administration with the will annexed, in order that they might obtain such letters of administration. Letters of administration, with the will annexed, granted to M. and J. *In the goods of Martindale (deceased)*, 27, L. J. Pr. & Mat.

ADMINISTRATION.—*Pendente lite—Defendant to suit appointed.*—Administration *pendente lite* under s. 70 of Probate Act, granted to the defendant in the suit, the plaintiff not opposing. *De Chatelain v. Pontigny*, 6 Week. Rep. 409.

ADMINISTRATION.—Practice—Limited administration—The next of kin residing abroad—20 & 21 Vic. c. 77, s. 73.—By section 73 of the 20 & 21 Vic. c. 77, where a person dies wholly intestate as to his personal estate, or leaves a will affecting personalty, but without having appointed an executor thereof willing or competent to take probate, or the executor is resident out of the United Kingdom, the Court of Probate may grant administration to any such person as the court shall think fit (though not by law entitled to administration); and such administration may be limited as the court shall think fit. In the following case, it appeared that A. died intestate, leaving personal property in England which required immediate management. B., his sole next-of-kin, resided in Australia, and had no duly constituted agent here. Administration was granted to C., the father-in-law of B., for the benefit of B., until he should himself apply for administration, on condition that C. should give justifying security, and exhibit an inventory. *Re Jones*, 27 L. J. Pr. & Mat. 17.

ADMINISTRATION.—With will annexed—Residuary clause—Construction—"Things."—In a will, which contained specific bequests of several articles of plate, furniture, &c., the last specific bequest being that of £30: Held, that a bequest to R. S., of "the residue my things," would not entitle R. S. to a grant of administration as residuary legatee. *In the goods of Henderson v. Ludlow*, 6 Week. Rep. 409.

ADMINISTRATION.—Next of kin resident out of the United Kingdom—20 & 21 Vic. c. 77, s. 73.—A. B. died a widower and intestate; his only son and the sole person entitled in distribution being resident in Australia. The property requiring an immediate legal representative, administration for the use and benefit of the son, was granted to his father-in-law under the 73rd section of the Probate Act. *Exp. Jones*, 30 Law Tim. Rep. 311.

ADMINISTRATION.—20 & 21 Vic. c. 77, s. 73.—**Aged next of kin—Administration to another to use of person entitled.**—A. died intestate, leaving an aged uncle and aunt, the only persons entitled in distribution. Administration granted at their desire for their use and benefit to their son, on the sureties justifying. *Re Roberts*, 6 Week. Rep. 460.

ADMINISTRATION BOND.—Assigning administration bond, given to a bishop before the Probate Act, for the purpose of putting it in suit—20 & 21 Vic. c. 77, s. 84.—By section 84 of the 20 & 21 Vic. c. 77, suits pending at the time of the act, in any court in England, respecting any grant of probate or administration, were transferred to the new Court of Probate; and the latter court has the same jurisdiction, power, and authority possessed by the court from which such suits were transferred. In 1854, an administration bond, with two sureties, was given to the

bishop of Chester. In 1854, a suit in Chancery was commenced by a creditor of the intestate against his administratrix, and, the condition of the bond having been broken, it was ordered by the Master of the Rolls that an action should be brought on it against the sureties. The proceedings required by the ecclesiastical court to be taken before commencing such action, were not completed at the time the Probate Act came into operation, when the testamentary jurisdiction of the Court of Chester ceased. On motion, that the court should order the bond to be attended with, for the purpose of being put in suit, the court decreed, that the registrar should order the bond to be assigned, for the purpose of being put in suit. *Quære*, whether, since 20 & 21 Vic. c. 77, an action will lie on such bond. *Young v. Oxley*, 27 L. J. Pr. & Mat. 30.

ADMINISTRATION BOND.—Amount—Sureties—20 & 21 Vic. c. 77, ss. 81, 82.—The 82nd section of the 20 & 21 Vic. c. 77, directs that the administration bond should be in double the amount under which the estate is sworn, unless the court should direct the sum to be reduced; and the 81st section leaves it to the option of the court to require sureties. In the following case A. died intestate, leaving his mother solely entitled in distribution: property sworn under £3000; debts, £45. The court granted administration on the mother entering into a bond in the amount of £100 with sureties. *Re Gent*, 31 Law Tim. Rep. 26.

ALIMONY.—Pendente lite—How estimated.—A husband may deduct from income derived from real property the expense of ordinary current repairs, but not extraordinary and permanent improvements, which ought to be charged on the fund of the income. The husband is liable for reasonable expenses incurred by his wife till the decree for alimony is made. Where several months had elapsed from the return of the citation and £150 had been paid on account, an alimony *pendente lite* of £120 per annum was decreed payable from the date of the decree. *Re Hayward*, 31 Law Tim. Rep. 25.

CITING HEIR-AT-LAW.—20 & 21 Vic. c. 77, ss. 61, 62, 63.—**Rules for contentious business, r. 34.**—By sec. 61 of the 20 & 21 Vic. c. 77, where a will affecting real estate is proved in solemn form, or is the subject of a contentious proceeding, the heir, devisees, and other persons interested in such real estate must, subject to the orders and rules under the act, be cited to see proceedings, or be otherwise summoned. In a suit transferred from the Prerogative Court of Canterbury, in which the defendant opposed a will propounded by the plaintiffs, an application was made by the plaintiffs under section 61 of the Probate Act, for leave to cite the defendant

and F., the co-heirs of the deceased. At the time the act came into operation the defendant had appeared, but had not given in any answer or allegation: Held, first, that it was no ground for rejecting the application that F. was the infant son of the wife of one of the plaintiffs. Secondly, that, as the plaintiffs were in a condition to call for the primary answer of the defendants when the Probate Act came into operation, they were entitled to cite the heir under s. 61. *Nichols v. Binns*, 27 L. J. Pr. & Mat. 14.

DISSOLUTION OF MARRIAGE.—*Practice*—*Amendment of petition for dissolution of marriage.*—Leave to amend a petition for dissolution of marriage, no notice of the motion having been given to the respondent, granted, on condition that the petition should be withdrawn, and served again when amended. *Re Wright*, 27 L. J. Pr. & Mat. 32.

FEME COVERT.—*Will—Husband—Separation by consent—Separate property acquired subsequently.*—In the following case, on the authority of *Cecil v. Juxon* (1 Atk. 278), and *Burch v. Cockell* (9 Ves. 369), property earned by a wife after separation from her husband was held under the circumstances to have become her separate property, with all the rights incident thereto, including the right of bequeathing it. A. and B. married in 1811, and in 1817 they verbally agreed to separate, and not to interfere with each other, and divided their then furniture and effects. The wife supported herself by her own industry, and acquired property which she disposed of by will in 1856. Probate of this will was opposed by the husband, who asserted his marital right to his wife's property: Held, that under the circumstances the property had been acquired to the wife's sole and separate use, and that the *jus disponendi* would attach, as a matter of course, to such property. *Haddon v. Fladgate*, 6 Week. Rep. 456.

JUDICIAL SEPARATION.—*Practice under 20 & 21 Vic. c. 85—Affidavit verifying petition not sufficient evidence—Identity.*—The affidavit of the petitioner required by sec. 41 will not be taken as evidence at the hearing, but the parties must produce sufficient evidence to prove the petition independently of such affidavit. The court is bound by the rules of evidence as observed at common law, sect. 48: *Semble*, the fact of an appearance having been given to the citation, no further steps in the suit having been taken by the defendant, will not be considered at the hearing as any proof of identity. *Re Deane*, 31 Law Tim. Rep. 26.

PROBATE.—*Copy of will—Evidence of execution of original.*—In a case at common law (*Doe d. Shellcross v. Palmer*, 16 Q. B.), the court refused to

admit declarations of a testator made after execution, as to an interlineation; *à fortiori*, such declarations cannot be received as to the whole will. A. made a will in India in 1850, and sent to England a copy in a letter to his solicitor; he made a codicil to the will in February, 1857, at Delhi, and transmitted a copy in the same way. A. lost his life in May, 1857, in the mutiny of Delhi, and the will and codicil were not forthcoming. On motion for probate of the will and codicil as contained in the copies sent to England, the court doubted whether it could hold the originals to have been duly executed on statement and assertion of the deceased alone, and ultimately refused the motion. *Re Ripley*, 31 Law Tim. Rep. 26.

PROBATE.—*Double probate—Executor substituted on death of original executor.*—In *re Lighton* (1 Hag. Ec. 235), a testator appointed two executors, and provided that, on the death of either, two others should be substituted; one of the executors only proved the will, and on his death probate was granted to one of the substituted executors, with the consent of the survivor of the original execut. vs. There the survivor of the original executors consented, but the right of the substituted executor being derived from the will cannot be affected by such consent. In the following case, it appeared that A. died, leaving a will, appointing B., C., D., and E. her executors, and directing that, in case B. should die, F. should be an executor in his place. All the executors proved the will. B. died, and F. applied that a double probate should be granted to him: Held, on the authority of the case of *Lighton* (1 Hag. Ec. 235), that he was entitled to the grant without the consent of the surviving executors, the will showing a clear intention that he should, on B.'s death, succeed him as an executor. *In the goods of Johnson*, 27 L. J. Pr. & Mat. 9.

PROTECTION OF PROPERTY.—*Acquired by a deserted wife—Practice—Citation—20 & 21 Vic. c. 85, s. 21.*—Service of a citation on the husband is not necessary in the case of an application by a deserted wife, under 20 & 21 Vic. c. 85, s. 21, for an order for the protection of property acquired by her since the desertion. Such order may be made on the affidavits of the applicant. *Exp. Hall*, 27 L. J. Pr. & Mat. 19.

PROTECTION OF PROPERTY.—*Order for the protection of property acquired by a deserted wife—20 & 21 Vic. c. 85, s. 21.*—The order for the protection of property acquired by a wife after she has been deserted by her husband, should, in terms, be for the protection of her property generally, and not of specific property, so as to leave open any question as to her title. *Exp. Mullineux*, 27 L. J. Pr. & Mat. 19.

REVOCATION OF WILL.—Destruction—Will not forthcoming at death of testatrix—Presumption of revocation rebutted by declaration of intention, &c.—The presumption of fact (for such it is and not of law merely) that a will, known to have been in the custody of the testatrix, and not forthcoming at her death, was destroyed by her, *animo revocandi*, is a *prima facie* presumption only, and may be rebutted by probable circumstances, amongst which declarations of unchanged affection and intention have much weight. It is not necessary for the parties seeking probate, having proved the factum of the original instrument, and given sufficient secondary evidence of its contents, to show how the original instrument was destroyed or lost. *Patten v. Poulton*, 6 Week. Rep. 458.

REVOCATION OF WILL.—Presumed—Will signed and attested at foot of each sheet—Destruction of last sheet.—Where a testator's will consists of several sheets, and he executes each sheet, and each is attested, yet if the will is executed and attested at the end, that is the only execution to be deemed as made in compliance with the statutes; if that is destroyed the whole will is revoked. It appeared that G., in 1855, wrote his will on six or seven unattached sheets of paper. At the foot of each sheet he signed his name in the presence of two witnesses, who also subscribed their names in his presence. After G.'s death two only of these sheets—viz., the third and fourth, could be found, but they contained a disposition of part of G.'s property. On motion for a grant of administration, with these two papers annexed as being the will of G.: Held, first, that it must be presumed that G. destroyed the lost sheets intentionally; secondly, that as the last sheet contained the only signatures which were in compliance with Wills' Act, the whole will must be presumed to have been revoked. *In the goods of T. Gullan (deceased)*, 27 L. J. Pr. & Mat. 15.

REVOCATION OF WILL [ante, p. 343].—Marriage and birth of child.—Formerly the Ecclesiastical Courts held, that marriage with the birth of a child operated as a *presumptive* revocation only of a will made before marriage, which might be rebutted by evidence of a contrary intention. However, in *Marston v. Doe d. Fox* (8 Ad. & El. 14), marriage with the birth of issue was held to operate as an absolute revocation of a will, and this is the rule established by the 1 Vic. c. 26, as to wills coming within its provisions. In the following case it appeared that A., in 1828, prior to, and in contemplation of marriage, made a will which provided for his intended wife (whom he made an executrix), and for the issue of such marriage: Held, that the marriage which ensued, together with the birth of a child, operated as

a revocation of such will. *Re Cadynwald*, 6 Week. Rep. 375.

SUIT FOR RESTITUTION OF CONJUGAL RIGHTS.—Insanity of wife.—The wife libelled for restitution of conjugal rights. The husband alleged the wife's insanity and a morbid hatred towards himself, which rendered cohabitation unsafe. The wife's responsive allegation admitted having been insane, but asserted her recovery, and denied the facts on which the husband relied to show continuance of insanity, and it was admitted to proof. *Re Hayward*, 31 Law Tim. Rep. 24.

WILL.—Execution by mark—Wrong name written against the mark.—A will, purporting in the commencement and testimonium clause to be that of S. C., was executed by a mark, against which was written the name S. B., and was handed by S. C., as her will, to one of her executors, shortly before her death. B. had been the maiden name of S. C.: Held, that as there was sufficient evidence that the mark was that of S. C., the execution of the will by her was not vitiated by another name having been written against her mark. *Re Clarke*, 27 L. J. Pr. & Mat. 18.

WILL.—Constraint—Undue influence—Incapacity—Husband procuring will from wife.—The admission of a responsive allegation, pleading the personal testamentary history of the testatrix, and that the paper in question was procured by her husband at a time when she was incapacitated by extreme illness was opposed: Held, that the earlier part of the allegation, though in itself inadmissible as not affecting the issue, yet, together with the averment of undue influence and incapacity, would be such evidence as a judge could not properly withdraw from the notice of the jury at a trial, and must be admitted accordingly. *Latham v. Woolbert*, 30 Law Tim. Rep. 339.

WILL.—Lunacy—Testamentary incapacity—Administration—Non-appearance on citation.—E. R. J. made a will whilst of unsound mind in favour of some charitable institution. The only party interested to support it, being cited to propound it or show cause why it should not be treated as void, did not appear. On an affidavit of the medical attendant of the deceased, of his testamentary incapacity, administration was granted to one of his next of kin, as in an intestacy. *Perry v. Dyke*, 30 Law Tim. Rep. 310.

BANKRUPTCY.

ADJOURNMENT.—On account of illness—Practice—Allowance of costs.—Where adjournments from time to time are granted, on account of insolvent's illness, the court will require him to give notice to his opposing creditors, before the adjournment day,

as to whether he will be able to attend or not. Where property is brought into court by the intervention of creditors, the general rule is to allow their costs at the audit. *Re Dinedale*, 30 Law Tim. Rep.

ADJUDICATION. — *Partners — Adjudication, against one member of a firm—Proper course.*—By sect. 97 of the Bankruptcy Act, 1849, a petition for adjudication against two or more persons may be dismissed as to one or more of such persons without affecting its validity as against the others. Mr. Commissioner Holroyd has held that, in the case on adjudication against one member of a firm consisting of two parties and assignees chosen thereunder, a joint petition against the firm is preferable to a petition against the other partner separately. *Cook v. Griffin*, 31 Law Tim. Rep. 26.

APPEAL. — *Where petition too late—Relief.*—Where an appeal by a bankrupt against the commissioner's refusal of his certificate was, through accident, not presented at the proper office until after the office was closed on the last day allowed for appeal, but was in the evening of the same day tendered to the officer at his private residence, the court permitted the petition of appeal to be entered as of that day. *In re the Hull Bank*, 27 L. J. Bank 16.

ARRANGEMENTS. — *Accounts not filed in time—Proposition not reasonable—Adjourning into court.*—By sect. 214 of the Bankruptcy Consolidation Act, it is provided that "the petitioning trader shall, ten days before the day appointed for private sittings of the court, file in court, and in such form as may be directed, a full account of his debts, and shall therein set forth such proposal as he is able to make for the future payment or compromise of such debts or engagements, and shall furnish the official assignee with a copy of such account." By section 223, if the "petitioning trader shall not file his account in manner aforesaid within such extended time as may be allowed him by the court for such purpose, his petition shall be dismissed; and if at the first private sitting or any adjournment the proposal of the petitioner or some modification thereof be not assented to it shall be lawful for the court to adjudge such petitioner a bankrupt, and to adjourn all further proceedings in the matter into the public court." The filing of his accounts by an arranging debtor under the above 214th section is a condition precedent of which the court is bound to take cognisance, so that where the accounts were not filed in time, the time appointed for the first private sitting may not be enlarged unless all the creditors consent. Where the accounts are not filed in time, but the proposal filed with them is so preposterous that the court cannot

entertain it, the commissioner will at once adjourn the matter into the public court under sect. 223, instead of discharging the petition. *Re Ince*, 31 Law Tim. Rep. 15.

ARRANGEMENTS. — *Solicitor appointed—Petition for arrangement—Bankruptcy—Conduct of proceedings.*—The conduct of proceedings in bankruptcy up to the choice of assignees, will be given to the solicitor for the opposing creditor in preference to the bankrupt's solicitor, who had acted as his solicitor under a petition for arrangement from which the bankruptcy proceeded, in accordance with the decision of the Lords Justices in *Exp. Sayers*, 26 L. J. N.S. 24, Bank. *Re Smith*, 31 Law Tim. Rep. 15.

BANKER AND CUSTOMER. — *Short bills—Bills treated as cash—Property in such bills on bankruptcy of bankers.*—The assignees of bankrupt bankers cannot retain bills received from a customer and entered (without his consent) as cash; it would be different if they had been paid in precisely as cash, and so constituted an immediate debt by the customer from the bankers. Bankers received short bills from their customers, and credited them with the amount as cash, and dealt with the bills at their discretion. The bankers became bankrupt, at which time they held some of such bills which were not then due. The assignees refused to deliver up the bills to the depositing customer, but it was held by one of the commissioners that there being no evidence of a contract or arrangement between the bankers and customer, that the bills should be treated in all respects as cash, the fact of these bankrupts having credited the amount secured by the bills to the customer as cash, did not render the bills the absolute property of the bankers; and the state of the account at the time of the bankruptcy showing that the customer had a balance in his favour, the assignees must deliver up the bills. Upon appeal, the Lords Justices affirmed the decision. *Exp. Barkworth, in re Harrison*, 27 L. J. Bank. 5.

CERTIFICATE. — *Fraudulent Preference.* — By sec. 256 of the Bankruptcy Consolidation Act, clause 4, if a bankrupt, within two months of the petition for adjudication, fraudulently, and in contemplation of bankruptcy, and not under pressure from any of his creditors, with intent to diminish the sum to be divided among his creditors, or to give an undue preference to any of his creditors, have paid or satisfied any such creditor wholly or in part, or have made away with, mortgaged or charged any part of his property, his certificate is to be refused, or to be suspended, and further protection refused. Where a bankrupt had committed the offence of fraudulent preference enumerated in the above 4th clause of offences appended to sec. 256, one of the commissioners refused him any certificate; but upon appeal, the Lords Justices

granted him a certificate of the second class, with a suspension of six months, and, with the consent of the assigness, granted protection in the meantime. *Exp. King*, 27 L. J. Bank. 11.

CERTIFICATE.—*Refusal*—*Carrying on business at a loss*.—Bankers who carried on business for many years at a loss, living on their customers' money, refused any certificate, but protection allowed, following *Exp. Rufford*. *Harrison v. Watson*, 30 Law Tim. Rep. 337.

COMPOSITION.—*With creditors after bankruptcy, annulling adjudication*, 12 & 13 Vic. c. 106, s. 230.—The 12 & 13 Vic. c. 106, enacts, "that any bankrupt, at any time after he shall have passed his last examination, may call a meeting of his creditors (whereof, and of the purposes whereof, twenty-one days' notice shall be given in the London Gazette), and if the bankrupt or his friends shall make an offer of composition, and nine-tenths in number and value of the creditors assembled at such meeting shall agree to accept the same, another meeting, for the purpose of deciding upon such offer, shall be appointed to be holden, whereof notice shall be given as aforesaid; and if at such second meeting nine-tenths in number and value of the creditors then present shall also agree to accept such offer, the court shall and may, upon such acceptance being testified by them in writing, and upon payment of such sum as the court shall direct, annul the adjudication of bankruptcy, and supersede or dismiss the fiat or petition for adjudication, and every creditor of such bankrupt shall be bound to accept such composition so agreed to." On the nearly similar provisions of the Irish Bankrupt and Insolvent Act, it has been held, that where a bankrupt enters into a composition with his creditors after bankruptcy, payable by his own promissory notes, the necessary number of creditors assenting, and where the official assignee has received a sum of money on foot of the bankrupt's estate, the court will direct the balance to be paid back to the bankrupt after deducting the costs of the bankruptcy and the assignee's costs, if any, and will annul the adjudication forthwith. *Re Calasher*, 31 Law Tim. Rep. 16.

DISMISSAL OF PETITION.—*Insolvent debtor*—*County court*—*Mandamus to hear petition*—*As to declining jurisdiction*—*As to power to adjourn the hearing sine die*—1 & 2 Vic. c. 110, s. 27.—Where it appears that the petition to the Insolvent Court is presented in order to frustrate the control of the Commissioner in Bankruptcy, that may afford a ground for dismissal of the petition in the Insolvent Court. *Exp. Munro*, 30 Law Tim. Rep. 301.

FRAUDULENT DEBT.—*Obtaining goods in the ordinary course of trade, when in a state of embarrassment*—*Becoming lessee when unable to pay the rent*.—

Though goods be purchased in the ordinary course of trade, yet, if the trade be in a state of great embarrassment at the time, it will be held to be a debt fraudulently contracted. If a party become lessee of premises, the rent of which he is unable to pay, although he makes no representation as to his circumstances, and is asked no question by the landlord, it will be held to be a debt fraudulently contracted. *Re Drake*, 30 Law Tim. Rep. 312.

HEARING.—*Extending time for service of creditors*.—Where no use has been made of the order for hearing, the court will occasionally enlarge the same and extend the time for the service of notices upon creditors, but the insolvent must formally appear on the day originally advertised. *Re Cole*, 30 Law Tim. Rep. 336.

HEARING.—*Discharge by detaining creditor before the day of hearing*.—Custody must be without any intermission during all the proceedings, otherwise the jurisdiction of the court is at an end. An insolvent petitioner having been discharged by his detaining creditor the day before that appointed for his hearing: Held, that, if he quits the prison, that amounts to an intermission of imprisonment within the 1 & 2 Vict. c. 410, s. 38, and the jurisdiction of the court is at an end. *Re Shallcross*, 31 Law Tim. Rep. 14.

MEMBER OF PARLIAMRNT.—*Disputed adjudication*—*Waiver of privilege by member of Parliament*—ss. 66 & 77 of Consolidation Act.—A member of Parliament, being a trader, and having signed an admission of a debt claimed under a trader-debtor summons, has thereby waived his privilege granted to members of Parliament by sec. 77 of the Bankrupt Act, 1849, and if he do not pay, secure, or compound for such debt within the seven days prescribed by sec. 81, he commits an act of bankruptcy upon which an adjudication may proceed. The staying of the advertisement of adjudication of bankruptcy, to enable the bankrupt to appeal, is in the discretion of the Commissioner, who will not order it to be stayed where there is no reason for thinking it would be otherwise than a waste of time. *Exp. Townsend*, 31 Law Tim. Rep. 75.

MIS-DESCRIPTION.—*Name*—*Non idem sonans*.—Held, that where there is the omission of a letter from an insolvent's name, when *non idem sonans*, he must amend and re-advertise. *Re Hendrie*, 31 Law Tim. Rep. 14.

PROOF.—*Full salary to clerks, &c.*—Sec. 168 of Consolidation Act—*Clerk to be paid by commission, not within*.—A clerk, who is to be paid by a commission on the goods sold by him, and not at a fixed salary, is not a clerk within the 168th sec. of the Bankruptcy Act, 1849. *Simmons v. Heldman*, 30 Law Tim. Rep. 311.

PROOF.—*Contingent debt—Covenant to pay in case of issue living at death of A.*—By s. 177 of the Bankruptcy Consolidation Act, 1849, a debt contingent at the time of the bankruptcy, may be proved for the value thereof ascertained by the court, or if the value be not ascertained before the contingency has happened, then, after the contingency has happened, the amount of the debt may be proved. A. covenanted with the trustees under his marriage settlement, that in case there should be any issue of the marriage living at his death, he would give by will, £2000 upon trust for his widow and children. The wife was living at the time of A.'s bankruptcy, and of the proof tendered, but there was no issue of the marriage: Held, *not* proveable as a contingent debt under the above 177th section of the Bankruptcy Act, 1849. *Knowles v. Smith*, 31 Law Tim Rep. 26.

PROOF.—*Merger—Election—Joint and several debt—Merger of debt in judgment—Proof in bankruptcy.*—A simple contract, or even a specialty debt, is merged in a judgment, and this is so as to joint debtors, where one only is sued and judgment obtained against them. The creditors of a partnership firm brought a separate action for the debt against one of the partners, and having obtained judgment, sued out execution. The sheriff seized the joint goods of the partners and sold them, but the day before the sale the sheriff received notice that the partners against whom the writ had been issued had become bankrupt. Afterwards the other partner became bankrupt, and the petitions were amalgamated: Held, that the creditor had elected to proceed against the separate estate of one of his debtors, and that the joint debt was merged in the separate judgment, at law and in equity, and could not be proved in bankruptcy against the joint estate. *Higgins v. Tyler*, 6 Week. Rep. 406.

PUBLIC COMPANY.—*Limited liability—Joint Stock Companies Act, 1856—Contributory—Liability of holder of shares "fully paid-up"—Fraud—Directors duty to disclose improper proceedings.*—A shareholder in a company registered as "limited" under the provisions of the Joint Stock Companies Act, 1856, who signs the company's deed for certain free shares "fully paid-up," but upon which nothing has been paid, is properly placed upon the list of contributories in respect of those shares. A shareholder may not take advantage of a series of resolutions passed by the directors at a board meeting and which were clearly a fraud upon the company, but of which he had no knowledge until after he had executed the deed, for the purpose of relieving himself from liability as a contributory, unless upon his discovering the fraud he immediately takes measures to return his shares to the company. If a man

purchase shares in a company and become a director, it is his bounden duty, so soon as he discovers anything wrong, to give notice of it to the shareholders. *Re The London Unadulterated Food Company (Limited)*, 31 Law Tim. Rep. 15.

PUBLIC COMPANY.—*Joint Stock Companies Act, 1856, section 80—Petition for winding up—Execution—Costs of.*—The Joint Stock Companies Act, 1856, section 80, enacts, that, "if any attachment, sequestration, or execution is issued against any company, by virtue whereof the estate and effects of the company, or any of them, may be attached, sequestrated, or taken in execution, at any time within three months next before the filing or presentation of the petition for winding up the company, such attachment, sequestration, or taking in execution shall be void in favour of the liquidators of the company, as against the attaching, sequestrating, or execution creditor, whether the same has been completely executed or not, except that such creditor, shall, if the attachment, sequestration, or execution would have been valid but for this provision, be entitled to retain out of any money already realised, his costs of suit and of the attachment, sequestration, or execution, or to proceed with the attachment, &c. for the purpose of realising such costs; but on satisfaction of such costs, or on tender of the amount thereof by the liquidators to the creditor, it shall be lawful for the liquidators to recover from such creditor, the property so attached, sequestrated, or taken in execution, and the proceeds of such property, or the residue thereof, as the case may be." A commissioner in bankruptcy has no jurisdiction under the above section of the Joint Stock Company's Act, 1856, to make an order for winding up a company, subject to payment of the costs of execution, and a *fi. fa.* issued by a judgment creditor against the goods of the company under which the sheriff had seized and sold, but had not paid over the proceeds to the creditor prior to the appointment of a receiver. *Ex parte Vousley*, 30 Law Tim. Rep. 327.

REPUTED OWNERSHIP.—*Assignment of debt by equitable deposit of power of attorney to receive—Notice of to debtor.*—In the following case the Commissioner emphatically observed what we have before had occasion to remark—"All the cases upon reputed ownership are so contradictory, I will not decide the point except subject to appeal." A debt once due to a trader is in his reputed ownership so long as no notice is given to the debtor of any assignment of such debt by the trader. It will therefore pass to the assignees of such trader on his bankruptcy before any such notice. *Poto v. Bryan*, 31 Law Tim. Rep. 74.

SECOND BANKRUPTCY.—*Estate not paying fifteen shillings in the pound thereunder*—6 Geo. 4,

c. 16, s. 129—*Legacy coming into possession afterwards belongs to assignees under that bankruptcy.*—The following case depends upon the provision as to second bankruptcy, &c., in the 6 Geo. 4, c. 16, s. 129, which does not appear in the Consolidation Act:—The testator bequeathed to A. for life, and from and after his decease as A. should by will appoint, and in default of appointment "to his personal representative," of whom one was B., who became bankrupt in 1830, and again in 1837. B. obtained his certificate under both bankruptcies, but his estate under the second bankruptcy did not pay fifteen shillings in the pound. A. died in 1844 intestate, and without children. By the 6 Geo. 4, c. 16, s. 129, if the bankrupt's estate under his second bankruptcy be insufficient to pay fifteen shillings in the pound plus the costs, "his future estate and effects shall vest in the assignees under that commission." Held, that the words "personal representative" meant the next of kin of A. living at his decease, of whom B. was one, and consequently that his share in the fund belonged, under the circumstances, to his assignees under his second bankruptcy. *Gramer v. Large*, 31 Law Tim. Rep. 74.

TRADER-DEBTOR SUMMONS.—*Deed of arrangement—Whether trader is bound to answer—Bond—Principles upon which ordered.*—Where a deed of arrangement has been prepared, but not executed, by six-sevenths of the creditors in number and value, as required by sec. 224 of the Bankruptcy Act, 1849, until after a dissenting creditor had served particulars of demand upon his debtor, with a view to proceedings in bankruptcy, the trader must, upon a trader-debtor summons, say whether he admits or denies the debt, and the court, if necessary, will order a bond if it be shown that the debt is in jeopardy: *Quære*, whether it would not make a difference if the estate had been divested out of the bankrupt at the time of serving the particulars of demand. *Ex parte Waring, re Trader-Debtor Summons*, 31 Law Tim. Rep. 17.

CRIMINAL LAW.

HIGHWAY.—*Justices, jurisdiction of, on summons against parish*—5 & 6 Will. 4, c. 50, ss. 94, 95.—On the hearing of a summons, under the 5 & 6 Will. 4, c. 50, s. 94, against the surveyor of a parish respecting the repair of an alleged highway, if the obligation to repair is denied by the parish, the special sessions cannot inquire at all into the matter, but are bound, under section 95, to direct an indictment to be preferred against the inhabitants of the parish. *Reg. v. Arnould*, 27 L. J. M. C. 92.

JUSTICES.—*Appeal case—Amendment of case stated by justices under 20 & 21 Vic. c. 43.*—The

court will not before argument order a case stated by justices, under 20 & 21 Vic. c. 43, to be amended, even where defective on the face of it. Before argument the court will only interfere if the justices refuse to state a case. *Christie v. Governors of the Poor of St. Luke's, Chelsea*, 6 Week. Rep. 261.

POOR RATE.—*Rateability of pier* [ante, p. 348]—*Seashore—Evidence.*—If the seashore between high and low water mark is alleged by a parish to be within it, they must give some evidence, as the usual perambulations, to show that it is within it; and therefore, where no evidence thereof is shown, the parish has no right to rate the part of the pier above the shore between high and low water mark. *Reg. v. Musson*, 39 Law Tim. Rep. 272.

POOR-RATE.—*Assessment of tithe rent-charge—Deduction.*—In estimating the rateable amount of a tithe commutation rent-charge, deductions ought to be made for expenses of collection and losses by non-payment, for property tax, for tenths and ecclesiastical dues, and generally for such rates and taxes as may be regarded as usual tenant's rates and taxes within sec. 1 of the Parochial Assessment Act, 6 & 7 Will. 4, c. 96. Deduction cannot be claimed for land tax, which is properly speaking a landlord's tax. *Goodchild v. Hawkins*, 6 Week. Rep. 367.

PUBLIC-HOUSE.—*Hours for general trading on Sunday afternoon*—9 Geo. 4, c. 61; 18 & 19 Vict. c. 118.—The hours of trading by keepers of public-houses are limited by the 18 & 19 Vict. c. 118, and no trading (with the exception of refreshment to travellers) is to be carried on between the hours of three and five o'clock p.m. on Sundays; this is the only restriction as to the afternoon; the morning trading is limited by the hours of divine service. The provisions of 9 Geo. 4, c. 61, are repealed. *Reg. v. Whiteley*, 30 Law Tim. Rep. 323.

SHIPPING.—*Certificate of Registry—Refusing to deliver up—Who entitled to the custody of—Merchant Shipping Act, 1854*—20 & 21 Vict. c. 43.—By section 50 of the Merchant Shipping Act, 1854, any person who has the possession of the certificate of registry of a ship, is bound to deliver it up, on request, to any person who shall be entitled to the custody thereof for the time being, under a penalty upon conviction before a justice of the peace, unless it be proved that there was reasonable ground for such refusal. The respondent was ship's husband and managing owner of, and was also the holder of the majority of shares in the ship of which the appellant was master and part owner. On the 29th of October, while the ship was in harbour, and before she had discharged, and while the appellant was still master, the respondent demanded the certificate of registry without giving any reason for doing so, and without intimating his intention of appointing another master.

The appellant, having refused to deliver it up, was summoned before two justices and convicted under section 50: Held, upon a case stated for the consideration of the court, that such conviction was improper, as there was reasonable ground for refusing to deliver up the certificate. *Arkle v. Hensell*, 27 L. J. M. C. 110.

SWEARING WITNESSES.—*Statute—Jurisdiction—Justices of the peace empowered to empanel jury—Implied power to swear witnesses—Waiver of irregularity—Construction of statute.*—A statute authorising land to be taken compulsorily, directed justices of the peace to summon a jury who should determine, upon their oaths, the amount of the price to be paid for such land: Held (reversing the judgment of the Queen's Bench of Lower Canada), that the power to swear the jury necessarily implied a power to swear witnesses tendered by either party for examination before such jury: Held, further, the justices having declined to swear witnesses on the ground of having no power to do so, that one of the parties, who submitted to this as a legal decision, and went on with the proceeding, did not thereby waive his right afterwards, on appeal, to contend that the justices ought to have sworn the witnesses: Held, further, that the refusal to swear witnesses was a fundamental error, and vitiated the entire proceedings before the justices. *Beaudry v. Mayor of Montreal*, 31 Law Tim. Rep. 18.

TURNPIKE-TOLL.—*Private roads—Using so as to avoid toll.*—The 3 Geo. 4, c. 126, s. 41, enacts, that if any person shall, with any horse, &c., go off or pass from any turnpike-road through or over any land or ground near or adjoining thereto (not being a public highway, and such person not being the owner or occupier, &c.), with intent to evade the payment of any tolls granted by any Act of Parliament or, &c., such person shall for every such offence forfeit and pay any sum not exceeding £5. The 3 Geo. 4, c. 126, s. 32, and 4 & 5 Vic. c. 83, s. 1, enact, that "no toll shall be demanded in respect of any horse, &c., which shall only cross any turnpike-road or shall not pass above 100 yards thereon." A person without being entitled to use a private road availed himself of it after using a turnpike-road for the space of eighty-four yards only, so as to get out into other roads on his way to and from his dwelling-house, and thereby avoided the payment of the toll which he must have incurred if he had continued his journey without going over the private road: Held, that by so doing he was not evading the toll within the meaning of 3 Geo. 4, c. 126, s. 41. The 100 yards mentioned in 3 Geo. 4, c. 126, s. 32, means 100 yards on the same journey, and cannot be made up by coupling two or more journeys together. *Veitch v. The Trustees of the Exeter Turnpikes*, 27 L. J. M. C. 116; 30 Law Tim. Rep. 316.

MOOT POINTS.

No. 35.—*Bailed Article destroyed by Fire.*

A. is possessed of a steam threshing machine. He lets it to B. for a certain time at a fixed price per day, including the attendance of A.'s man to superintend its working. After the time had expired, B. requests A. to allow the machine to remain on his premises for a short time longer, until the remainder of his corn be threshed, although he did not require its immediate use. This A. consented to do; but before the machine was again worked a fire took place on the premises of B., and totally destroyed A.'s machine. The fire, it seems, occurred through the carelessness of one of B.'s men, who lighted his pipe in the barn and threw the ignited match amongst the straw.

Under these circumstances, who must bear the loss occasioned by the destruction of the machine?

W. M. S.

No. 36.—*Innkeeper—Cow—Charges.*

A cow (in consequence of a dispute as to the sale thereof, and the owner leaving it in the market) strolls into the yard of an innkeeper; a fortnight elapses, the innkeeper providing for the cow in the meantime. Buyer and seller know that the cow is at the innkeeper's, but neither of them will own it. What is the duty of the innkeeper under the circumstances? and how is he to proceed to recover his charges.

T. F. P.

No. 37.—*Power of Appointment of New Trustees.*

B., by his will, devised all his property to five trustees, their heirs, executors, administrators, and assigns, upon trust for sale. In his said will were contained the following provisos: "Provided also, that when two vacancies shall occur in the trusteeship of my will, by reason of any two of my said trustees dying, the trustees or trustee for the time being, whether intending to continue in the trust or not, shall have power to nominate a new trustee or two new trustees, and thereupon my trust property shall be vested in and the powers and directions hereby given to my trustees be exercisable by the old jointly with the new trustees or trustee, or by the new trustees solely as the case may require. Provided nevertheless, that the original number of trustees shall not, by the execution of the preceding power, be increased nor diminished below three, but each new trustee be nominated to fill the place of an old trustee." A portion of the property thus devised has recently been sold, and I should be glad if some of your correspondents would inform me whether, in their opinion (two of the five ap-

pointed trustees being dead), the purchaser can compel the survivors to appoint two new trustees in the place of the two deceased, or whether they consider the words "shall have power," contained in the first before mentioned proviso, explained as it is by the second, reduce it to an appointment to be executed or not, as the three survivors may think fit. M.

No. 38.—*Devise—Lapse.*

T. S., by his will, executed in 1839, devised to his wife for life, ten acres of land, remainder to his son R. in fee; subject to the payment of £50 to his daughter C., and £50 each to his sons W. and J., with the proviso, that if either of his said children, C., W., and J., should die before the said sum of £50 became due and payable to any of them as aforesaid, then it was his will, that the portion of the child, or children, so dying, should descend to, and be equally divided between, the survivor or survivors of them. C. died in the lifetime of testator without issue. The mooter is of opinion that the legacy to her lapsed (*Brett v. Regden*, Plowd. 340; 1 Steph. Com. 559, 1st edit.), and that having never vested, the clause of survivorship as to that legacy, is imperative.

Does R., the devisee, take the land free of the legacy given to C.; if not, must he pay such legacy to W. and J. the survivors, or is the residuary legatee entitled to it? J. W., Jun.

No. 39.—*Administration Bond—Witness.*

Is a "commissioner to administer oaths in Chancery in England" the proper party to attest the execution of an administration bond in the principal registry under the provisions of the Probate Act (20 & 21 Vic. c. 77)? The form of attestation in the rules of practice is "signed, &c., in the presence of K. L. registrar, or C. P. a clerk. &c."

In the district registry it seems clear that it is not indispensable for the bond to be witnessed by the registrar or clerk, the form being as follows: "Signed, &c., in the presence of K. L., commissioner, M. N., District registrar, or C. P., a clerk, &c." It would thus appear that if a commissioner can attest district bonds, *à fortiori*, he may those in principal registry also, as the act could scarcely intend that the party should personally attend the registrar or his clerk.

Section 45 provides that "commissioners for taking oaths in the High Court of Chancery shall be commissioners for taking oaths in the Court of Probate." THEMIS.

No. 40.—*Married Women—Reversionary Interest in Proceeds of Real Estate after Sale.*

A testator, by his will made in 1849, after direct-

ing payment of his debts, gave and bequeathed to trustees his real and personal estate upon trust to pay the income thereof unto his wife (who is still living) for life, and, after her death, upon trust to sell and to divide the proceeds of such sale between testator's children in certain proportions.

Shortly after testator's death, his debts were found to be so considerable as to render a sale of a portion of his real property necessary; and, by consent of all parties interested, the whole of his real property was sold, and after payment of his debts, the surplus was invested by the trustees and the interest thereof has since been paid to the testator's widow. One of testator's children is a married woman.

Quere. What is the nature of her present interest under the will: has the sale converted it into a reversionary interest or *personalty*, or would the fact of the period named in the will for such sale not having yet arrived operate so as to impress the fund with its original character of realty so as to render the married woman capable of disposing thereof by deed acknowledged in the usual way?

I am of opinion that the sale, with the consent of all parties interested, has entirely changed the character, and that the married woman's present interest is a reversionary interest in *personalty*, and therefore not capable of alienation. B.

No. 41.—*Settlement—Trustees—Survivor.*

A settlement of real estate authorises a sale by the three trustees or the survivors or survivor of them; the receipt clause speaks of the three trustees and the survivor only, omitting "survivors." Can two surviving trustees give a good receipt for the purchase money? It is submitted not, as the creator of the trust must be considered as having directed that the money shall be paid only to the three or the one of them proving to be the survivor, though there is little doubt that the word "survivors" was accidentally omitted. I am told there is an express decision, but I have not been able to find it.

T. E. D.

No. 42.—*Power to Sell in Mortgage.*

A mortgage deed gave the mortgagee, "his heirs or assigns" a power of sale; the money was not the mortgagee's, but belonged to B. The mortgagee executed a declaration of trust in favour of B. in the usual form. B. died intestate, and C. became his administrator. He subsequently sold the mortgaged premises under the power, and, without the mortgagor joining, he and the mortgagee purported to convey the premises to the purchaser. The recital of the contract for sale is framed as though C. was the person entitled to execute the power of sale, and C. alone signs the receipt for the purchase money.

It is now contended that the power was not well executed, or at least that the receipt was not given by the proper person, as the mortgagee should have signed it. On the other hand, it is contended that as C. and the mortgagee joined in the conveyance, there must have been a sufficient execution of the power, and that C. being the representative of the party beneficially interested, was the proper person to sign the receipt, and that it would have been wrong if the mortgagee alone had signed it. The objection is taken by a purchaser from the above purchaser; if the objection is considered valid in appearance cannot it be got over in some way?

W. S.

No. 43.—*Contract for Sale—Mines.*

A. contracted to purchase a piece of land, which he knew had been allotted to the vendor under an Inclosure Act. In the Inclosure Act is a clause expressly reserving to the lord his right to the mines and minerals under the land in question. The purchaser had no knowledge of this clause, and thought he was to have the mines and minerals. Can the vendor force the purchaser to take the land without the mines and minerals, and without making any compensation in respect thereof?

W. S.

No. 44.—*Post-nuptial Settlement—Wife's Choses in Action.*

A post-nuptial settlement was made of the wife's reversionary choses in action solely; the limitations being to the wife for her life to her separate use, remainder to the surviving husband for life, remainder to the children of the marriage, remainder, in default of children, to the wife, her executors, &c., absolutely. Shortly after the execution of the settlement the husband died, and immediately thereafter the wife required the trustees to re-assign the property, contending that as it was reversionary even at that time, she was not bound by the settlement. No children of the marriage have been born, but it is believed the wife is *enceinte*. The trustees suggest that they cannot be required to re-assign without a suit in equity, and that the doctrine of *Bill v. Cureton* (2 Myl. & K.) may be considered to apply to the settlement in question. No doubt the general rule is laid down in the text-books that the wife surviving is not bound by the settlement, but it is considered that the proposition should be modified by reference to the case of *Bill v. Cureton*. The opinion of your readers, with references to any decisions in point, will oblige.

T. E. D.

ANSWERS TO MOOT POINTS.

No. 29.—*Railway—Riding in Wrong Class—Conviction (ante, p. xxxiv).*

I must on this point express an opinion differing from that of the mooter.

The principal question to be considered is, Is the by-law of the company, subjecting any person found travelling in a first-class carriage with a second-class ticket to a penalty besides the payment of the difference of fare, legal? The Railway Clauses Consolidation Act, 1845 (8 & 9 Vic. c. 20), s. 109, gives power to companies to make by-laws, provided they "be not repugnant to the laws of that part of the United Kingdom where the same are to have effect;" and it enacts, that any person offending against any such by-laws shall forfeit any sum not exceeding £1, to be imposed by the company in such by-laws as a penalty for any such offence. I cannot see any illegality in such a by-law as that above-mentioned; and, therefore, due publication of it having been made, as by the 110th sec. is required, it will be binding on all parties, and the penalty may be enforced against them. It may be said to be objectionable as an unreasonable by-law, which might operate as a hardship on some persons, as would appear to be the opinion of the mooter with regard to A.; but in this I can hardly concur. The by-law was made to prevent persons defrauding the company by travelling in first-class carriages with second-class tickets, and due notice thereof was given, which is a sufficient publication, and binds everyone. A. takes a second-class ticket, and, in direct opposition to the notice, travels in a first-class carriage; but upon being discovered, he tenders the difference of the fares, and on this ground it is said that there is *prima facie* evidence of a non-fraudulent intention. I do not at all think so; for it is the greatest probability that a person, who was so travelling with a fraudulent intention, would, in order to escape from the penalty, offer to pay the difference of fare upon discovery, since there would be no other way of escaping; and, if A. were to be not liable to the penalty, the fraudulent person would not be liable, and the by-law would have no effect as a prevention of fraud, as was intended by its makers. Besides, it cannot but be presumed that A. had due notice, and, in acting contrary to such notice, he can only blame himself for incurring the liability to the penalty. As to his having got into the first-class carriage by accident, I can hardly suppose that a person does not know the difference between a first-class and a second. But, in case he was ignorant of his being in a wrong class, or in case he was shown by a porter into a first-class carriage, having asked to be shown into

a second, or having asked for a first-class ticket being given a second-class ticket, and there being proof of these, or any other circumstances of a like nature tending to show that there was really no fraudulent intent, the magistrates ought to take them into consideration, as grounds for mitigation of the penalty, or dismissal of the case. There does not appear in the moot point to be any such ground; therefore, I think, since the by-law is legal, and also reasonable, that the conviction was good. V.

No. 81.—*Mortgage—Priority—Notice* (*ante*, p. xl.).

The question raised by the mooter in this point is one which, I think, is clearly set at rest by the case of *Jones v. Jones* (7 Law J. 164, N. S. Ch.); in which it was decided that a second mortgagee who gives no notice of his incumbrance to the first mortgagee, shall not be postponed so as to give priority to a third mortgagee, who gave notice of his security to the first mortgagee. Shadwell, V. C., in this case, said: "At law, the rule clearly is that different conveyances of the same tenement take effect according to their priority in time. Equity follows the law, and where the legal estate is outstanding, conveyances of the equitable estate are construed and treated in a court of equity, in the same manner as conveyances of the legal estate are construed and treated at law; and he who is prior in time must be prior in equity." He then remarked, upon the notice given by the third incumbrancer to the first mortgagee, that "According to what the Lord Chancellor decided in *Peacock v. Burt* (Coote Mortg. 698; 4 L. J. 33, N. S. Ch.; 3 Sug. Vend. & Pur. 420, 10th edit.), such notice is of no value. Jones, the first incumbrancer on the equity of redemption, took his title by conveyance, and notice on possession was not necessary to complete his title. Harries (the second incumbrancer of the equity of redemption) took his title by a subsequent conveyance, and merely gave a notice, which did not and could not affect Jones."

Wherefore G. H. will retain his priority to I. K., not being affected by the notice of I. K. to the first incumbrancer. V.

PAYMENT OF THE TRAVELLING EXPENSES OF VOTERS AT ELECTIONS.

Cooper v. Slade.

The House of Lords have now delivered judgment in the notable case of *Cooper v. Slade* (3 L. C. 47). It was a writ of error from the judgment of the Court of Exchequer Chamber, and raised the important question on which parliamentary election committees have given such varying decisions—viz., whether the payment of the travelling expenses of a voter by the candidate does not render him liable

to penalties under the Corrupt Practices Prevention Act of 1854. The present plaintiff in error had sued the defendant in error, Mr. F. W. Slade, Q.C., one of the candidates for the borough of Cambridge, in August, 1854, for penalties under the statute in question. The material counts in the declaration were the first, seventh, and eighth. The first count set forth that on the 11th of August, 1854, a writ issued, directed to the Mayor of Cambridge, for the election of two burgesses to serve in Parliament, and that before the commencement of the said action the election of the said burgesses had been duly made and declared. The 7th count alleged that the defendant, after the passing of the act, promised money to or for one Richard Carter, who was a voter within the meaning of the statute, in order to induce him to vote at the election, contrary to the form of the statute, whereby the person so offending became liable to forfeit £100, and an action had accrued to the plaintiff to demand and have the same from the defendant. The 8th count charged that the defendant, after the passing of the act, corruptly gave money to or for Richard Carter, on account of his having voted at the election, contrary to the form of the statute, whereby he had forfeited a further sum of £100, and an action to recover the same had also accrued to the plaintiff. The defendant pleaded simply "never indebted." The action was tried at the summer assizes of 1855, at Cambridge, before Lord Wensleydale, then Baron Parke. Proof of the issue of the writ mentioned in the declaration to the Mayor of Cambridge having been given, it was proved that Carter was a voter for that borough, and that on the day before the election, while he was in Huntingdon, he received the following letter from the committee conducting the election of Viscount Maidstone and Mr. Frederick Wm. Slade:—

"Cambridge Borough Election, Committee-room,
Lion Hotel, August 12, 1854.

"Sir,—The mayor having appointed Wednesday next for the nomination, and Thursday for the polling, you are earnestly requested to return to Cambridge and record your vote in favour of Lord Maidstone and F. W. Slade, Esq., Q.C.—Yours truly,
CHARLES BALLS, Chairman.

"Your railway expenses will be paid.

"Mr. R. Carter."

The whole of this letter, with the exception of "Mr. R. Carter," and the words "your railway expenses will be paid," was printed. Carter, who returned to Cambridge and voted in favor of Lord Maidstone and Mr. Slade, was subsequently paid by the agents of the latter 8s. for travelling expenses. Evidence was also given that Mr. Slade, having been asked whether it would be legal to get up the outvoters and pay their travelling expenses, had sent for a law book and read the opinion of Chief Justice

Tindal, where he said, "I think the expenses are legal, and that nothing beyond legal expenses are to be paid." Counsel for the defendant called no witnesses in his behalf, but contended that the evidence adduced by the plaintiff was not sufficient to entitle him to a verdict on the 7th and 8th counts, and ought not to be left to the jury. The learned judge held that the evidence was sufficient, and directed the jury to find for the plaintiff on the 7th count if they believed that the defendant, or any person acting on his behalf, promised money to Carter, though the sum was no more than Carter's fair and reasonable travelling expenses from Huntingdon to Cambridge; and also to find for the plaintiff on the 8th count, if the defendant or any person authorised by him paid the money to Carter, although he was not aware that he was thereby committing an offence. The learned counsel for the defendant excepted to this ruling, and the jury found a verdict for the plaintiff for £100 on the 7th and £100 on the 8th counts. The case was taken on the bill of exceptions before the Court of Queen's Bench, which held that the ruling of the learned judge in the court below was right, and on this judgment a writ of error was sued out; and in February, 1866, the Court of Exchequer Chamber, after argument, reversed the judgment of the Court of Queen's Bench and awarded a *venire de novo*. The present plaintiff in error then brought the case before the House of Lords, where it was argued in July last. On behalf of the plaintiff in error it was contended that the promise to a voter of his travelling expenses with the view of inducing him to vote for a particular candidate at an election for a member of Parliament, was illegal within the meaning of the 28th section of the Corrupt Practices Prevention Act of 1854, and that the payment to a voter of such expenses on account of his having voted for a particular candidate at such election was a corrupt and illegal payment within the meaning of the same statute, whatever might be the belief of the party so paying as to the legality or illegality of the payment. The arguments having concluded, their lordships left the following questions to the learned judges:—1st Whether there was any evidence to go to the jury that the defendant had been guilty of bribery; 2nd Whether there was any evidence to go to the jury that the letter in question was written and sent to Carter by the authority and with the knowledge of the defendant in error; 3rd Whether there was any evidence to go the jury that the defendant had corruptly paid money to Carter for his vote. The learned judges having taken time to consider, delivered their opinion on the 15th of last month, Barons Channell and Watson, and Justices Willes,

Wightman, and Williams answered all the questions in the affirmative; Baron Bramwell answered them all in the negative. Mr. Justice Coleridge replied to the first and second questions in the negative, and with regard to the third, that the defendant in error had paid the money to Carter illegally, but not corruptly.

Lord Cranworth afterwards delivered judgment. He said this case of "*Cooper v. Slade*" came before their lordships on a writ of error from a judgment of the Court of Exchequer Chamber, under the act 17th & 18th Victoria, c. 102, for the better prevention of corrupt practices at elections. The 31st section enacted, that the candidate should appoint an election agent; and under the 15th section, the returning officer was to appoint an election auditor, who was to audit all the expenses. It had been proved at the trial, that all this had been done in conformity with the provisions of the act. The first question which their lordships had to consider was, whether the payment of 8s. as travelling expenses to a voter—if such payment were made by the authority of the candidate—was bribery within the meaning of the act. If that question were decided in the affirmative, it would be necessary to prove that the payment had been made by the authority of the candidate. On the first question, though it had given rise to much discussion, he had never entertained the slightest doubt, that giving money to a voter that he may vote for a particular candidate, was giving money within the meaning of the section, which said:—"Any person who directly or indirectly, shall give any money to any voter to induce him to vote, shall be guilty of bribery." Surely, therefore, if a candidate said to a voter, "If you will come to Cambridge and vote for me, I will give you whatever money you have to pay to indemnify you," that was giving the voter money to induce him to vote. Their lordships might in their legislative capacity consider it right to alter this portion of the act, and say, that money given to pay the mere travelling expenses of an outvoter, was not within the meaning of the word "bribery;" but they had now to decide the question in their judicial capacity, and for his own part, he thought they could entertain no doubt that such payment was bribery, within the meaning. That being so, the only question which remained, was, whether there was evidence, that the money so given, was given by the authority of the candidates, Lord Maidstone and Mr. Slade. It had been proved in evidence, that during a discussion which had arisen, whether the payment to an outvoter, of his travelling expenses was lawful or not, Mr. Slade had said, for the guidance of his agents, that it was lawful Surely, when the agent wrote to the outvoter

"Your railway expenses will be paid," the irresistible inference was, that the payment was promised under the authority of the candidate. He confessed these two points appeared to him to be perfectly clear, and the only error he saw in the case was this—he did not think the evidence warranted a finding against the defendant on both counts. Though the payment of the outvoter's expenses from Huntingdon to Cambridge, was corrupt—the sense in which he used the word "corrupt," was, that the payment was in violation of the statute—he thought it clear that the legislature never meant that two penalties should be recoverable, one for the promising of the money, and one for the payment of it. The question, then, under those circumstances, was what course ought to be pursued? He had at one time thought that there should be a *venire de novo*, but on consideration, he did not think that should be done, for the objection taken, was not pointed to that part of the case. It appeared that an arrangement had been made, and that the plaintiff in the court below, was willing to forego one of the penalties, and to enter a *nolle prosequi* on one count. It appeared to him, that the judgment of the court below, awarding a *venire de novo* was wrong, and he would recommend to their lordships, that the judgment should be entered for the plaintiff, but with his consent, on one count only.

Lord Wensleydale said that, with respect to the first proposition, the Court of Exchequer had been unanimously of opinion, that money given to a voter for travelling expenses, with the implied condition that he was to vote for a particular candidate, was a payment in violation of the act of Parliament. Taking the letter written to the voter Carter, there could be no doubt that his railway expenses were to be paid if he did what was required of him—that was, to come to Cambridge, and record his vote for Lord Maidstone and Mr. Slade. On that part of the case, there had been no doubt in the minds of the learned judges who had advised their lordships. Then came the more important question, whether this payment could be traced to Mr. Slade or his agent. It was a clear proposition of law, that if a man employed an agent for a perfectly legal purpose, and the agent did an illegal act, it did not bind the principal, unless the principal had given the agent authority to do all that he could, legal or illegal, for his client, in which case the principal must be bound by the illegal acts of his agent. Two of the learned judges (Baron Bramwell and Mr. Justice Wightman) who had given their opinions considered there was not evidence to prove that the letter to Carter had been written by the authority of Mr. Slade; but the jury, who had seen the witnesses, and were, therefore, more competent to form an opinion, had come

to a different conclusion. He thought the jury were perfectly right in coming to that conclusion. It mattered not whether Mr. Slade supposed that he was acting perfectly right. He supposed that Mr. Slade, acting on the decision of Lord Chief Justice Tindal, thought it was perfectly fair to offer the out-voter the payment of his expenses to the poll. He confessed he was not perfectly satisfied that such a payment was corrupt within the meaning of the statute; but as this part of the case was abandoned, he concurred with the noble and learned lord (Lord Cranworth) that the judgment of the court below should be reversed.

PUBLIC HEALTH ACT.

A bill has been introduced in the Commons to amend the Public Health Act, 1848, which will introduce a considerable change, and is consequent upon the Board of Health Act expiring in September next, and with it, a number of local boards dependent upon it. The proposed measure, it was said, was not a continuance bill, but one of a permanent character. The general principle of the bill was this—to decentralise the whole system; to allow the General Board of Health Act to expire next September; to permit all towns that wished to have local powers of administration, to establish local boards themselves by the resolutions of meetings of householders and ratepayers—two-thirds of whom to be consenting parties to the same; or where places were represented by councillors or commissioners, such representatives to be empowered to decide on the question, due care being taken that proper notice should be given to all persons interested in the matter. Provision was also made for an appeal against the establishment of such local board, if not informed by notice of the intention to establish the same. In regard to such local boards brought into existence, it was proposed, that the amplest powers of self-administration should be given, and that no longer should they be required to refer to the board of London, or to appeal to it upon current matters of self-administration. The power of appeal should, however, be given to individuals who considered themselves aggrieved, to the Secretary of State for the Home Department. The several bodies should be subject to annual elections. The general functions of a medical character, it was proposed to deal with by a separate bill. This arrangement would greatly simplify the present measure. It was not proposed to repeal the existing law, but to embody the present measure with it, and thus to form a complete act for the management and improvement of towns in general.

MR. JUSTICE MAULE.

Having in vol. 2, p. 59, shortly noticed the death of Mr. Justice Maule, we avail ourselves of an extract from the last number of the *Law Magazine*, which contains a full and interesting sketch of that learned, though eccentric, judge.

Sir W. H. Maule was the son of a medical man at Edmonton. He went, in due course, to Cambridge, became senior wrangler,—*facile princeps*—for the marks showed Maule 1600, while the second was 900 only. He became fellow of Trinity, and among his pupils at the time were Sir Edward Ryan (the Late Chief Justice of Bengal) and Mr. Justice Cresswell. Mr. Babbage, one of his oldest and firmest friends, affirms that Mr. Justice Maule was one of the most acute and profound mathematicians of the day, and had he not turned to the law, must have achieved the highest honour as a scientific man: "He would have been the first mathematician in Europe." His progress in his profession was not so rapid as might have been hoped for by a man of his powers, with the prestige of his university career to start him; and this is the more remarkable, as he possessed in an eminent degree not a few both of the higher and the lower qualities of a great *Nisi Prius* leader, and can hardly be said to have been obviously deficient in any of them. His presence and stature, without being remarkable, were sufficient; his features bold and well-formed; his countenance striking and expressive; his voice clear, well-toned, and powerful; his air and manner, for the purposes of satirical and humorous expression, perfect, and by no means inadequate, when he exerted himself, to grave and serious emotion; he possessed ample command of language, with that rare gift of felicitous expression in homely terms; unrivalled powers of ridicule, sarcasm, and retort; presence of mind; fertility, and readiness of resource; energy and resolution; yet with all this it was only by slow steps that he found general recognition among that branch of the profession with which the selection of counsel lies; indeed, we doubt whether at his period of greatest success he ever had, either on his circuit or elsewhere, that run of *Nisi Prius* business which has been enjoyed by many men not only of less real power, but in no equal degree possessed of obviously striking qualities. This was, no doubt, like most of the phenomena of our lives, the simple result of a complicated variety of causes, some of which it would not be difficult to those who knew him to trace out. The chief of them probably may be characterised as a virtue hatched on to a defect. His dislike of all pretence, of anything that might be classed under the comprehensive name of humbug, was intense, still more

so his abhorrence of anything at all verging upon sycophancy in conduct; excellent qualities in themselves, but which, when brought into action in combination with a certain waywardness of character from which he cannot be pronounced free, had in him the unfortunate result of his wilfully throwing away the fairest opportunities of putting himself forward; of his avoiding or even repulsing acquaintances which might essentially have served him, and which he had the most legitimate opportunities of cultivating, which in fact offered themselves to him without any cultivation whatever; of his gaining a character for eccentricity not perhaps altogether undeserved, but very much beyond what he really deserved; and finally, of a demeanor in his intercourse with actual or possible clients so little conciliatory, that, unless he has been much belied, it not seldom fell as far short of fair average civility, as that which scandalised him did of decent self-respect. In fact, with reference to this last drawback on his progress, we have heard it reported that when Mr. Knight was about to drop the Brecon Circuit, he observed, in recommending some junior friend to join it, that Maule was the only man on it fit for much, and he might always be heard blowing up his attorney. Add to this, that, so far as success on circuit was concerned, his mode of address was not probably altogether of the kind best suited to the common run of country juries. He had neither that congenial stupidity which enables men not otherwise remarkable to appeal successfully to the stupid, nor that peculiar form of talent by which some men, anything but stupid themselves, can condescend to and play upon the stupidity of others. His train of thought was too strictly logical to be readily followed by those who were not themselves logical, and his irony was not unfrequently perhaps taken for earnest by the matter-of-fact clowns. That this last sometimes happen when he was upon the bench, we shall hereafter have occasion to mention. Nevertheless, with all drawbacks, he was unquestionably an advocate of the first order, especially in a certain class of cases; for, beyond a doubt, he was more congenially employed in throwing cold water on the pathos of his friend and rival, Serjeant Talford, than in appealing himself to the sentimental emotions. We remember to have heard of a match (so to say) played out between those two masters of the game, in which court, jury, and spectators, after being moved almost, if not quite, to tears (for the judge was one by no means incapable of a fit of the lachrymose, the late Mr. Justice J. A. Park), on behalf of the plaintiff, were afterwards convulsed with laughter by the speech for the defendant: to the best of our recollection Democritus carried the day. Elected member of Parliament, he yet had but

little time for parliamentary success, for in 1839 he was promoted to the Bench, first to the Court of Exchequer, and then to the Pleas. In general, his most striking characteristic as a judge seems to us to be summed up in a certain rare union of common-sense and ingenuity, of common-sense informed by ingenuity, with ingenuity subordinated to common-sense, resulting in judgments admirable taken in the whole, but more so for their general effect than for any striking points. Not but what there is much that strikes as you read, apt and ingenious illustration, far-sighted provision of remote consequences, refined perception of analogy, felicitous expression, the whole not unfrequently seasoned with a dash of humour and sarcasm, which lends a life hardly their own to the dry bones of the argument; but still, when you have done reading, all this matter of detail sinks into comparative insignificance, and the general impression that remains is chiefly that of a lucid exposition of principles, and, above all, of a thoroughly business-like application of them. One observation will hardly fail to strike at first sight: that with all his ingenuity there is a total absence of supersubtle hair-splitting; that practical common-sense is always the master, and ingenuity the servant, in which capacity the latter often does an admirable stroke of work, in defeating technicality at its own weapons.

EXAMINATION QUESTIONS.

(Easter Term, 1858).

PRELIMINARY.

I. Where, and with whom, did you serve your clerkship? II. State the particular branch or branches of the law to which you have principally applied yourself during your clerkship. III. Mention some of the principal law books which you have read and studied. IV. Have you attended any, and what, law lectures?

COMMON AND STATUTE LAW AND PRACTICE OF THE COURTS.

I. What is the meaning of a *local* and of a *transitory* action? And what actions are local and what *transitory*? II. Can an *infant* bring an action, and how must he sue? III. If there be two joint obligors in a bond, and one die leaving executors, against whom must the action be brought? IV. In what form must a promise by one person to pay the debt of another be made so as to be valid? V. What is the main difference between an action of *trover* and an action of *detinue*? VI. Will an action of debt lie upon a mortgage-deed in which there is a covenant to pay principal and interest on a day which is past? VII. What is the difference between

a specialty debt and a simple contract debt? VIII. At the end of what periods respectively are such debts barred by the Statutes of Limitations? IX. Jones and Wilkinson bring an action against Bennett to recover £100 due from him to them jointly. Wilkinson alone owes Bennett £50. Can Bennett set off this £50 in the action against him? And if not, why not? X. Where a deed or other written instrument has an attesting witness, in what cases is it now necessary to call the attesting witness in order to prove the execution? XI. Should matter of defence arise after plea and before verdict, can a defendant avail himself of it? And if so, how, and in what manner? XII. If you have written documents which you desire to give in evidence in a cause, what step must you take to entitle yourself to the costs of proving them? XIII. Where a verdict has been set aside and a new trial ordered, and previously to the first trial the usual notice to inspect and admit documents has been given and admissions made under it, is it necessary to give a fresh notice or to obtain fresh admissions of the same documents upon the second trial? XIV. Can a plaintiff in a superior court be nonsuited against his will? And in what respect is his situation better by being nonsuited than by having a verdict entered for the defendant? XV. Is a tender good if clogged with any, and what, conditions?

CONVEYANCING.

I. What is necessary to enable a married woman to convey her interest in real estate? II. Can a trustee give a power of attorney to another person to act for him in the trust? And give a reason for your answer. III. Is there any, and what case, where, if a legatee dies in the testator's lifetime, the legacy does not lapse? IV. If a person who is illegitimate dies intestate leaving no legitimate issue, who becomes entitled to any real or personal estate of which he may die possessed? V. Who is the protector of a settlement? VI. In case the person who would otherwise be a protector is a lunatic, idiot, or of unsound mind, who is then the protector? VII. If entailed property is disposed of by a deed executed by the tenant in tail, but not by the protector of the settlement, what is the effect of such deed? VIII. If a person dies intestate and possessed of real and personal estate leaving a son, and two daughters the issue of an elder son, surviving,—who becomes possessed of his real and personal estate? IX. If such person leave an eldest son, and a son and daughter, the issue of a younger son deceased, who then becomes entitled thereto? X. A. appoints B. his executor; B. dies intestate. How must a representative to A. be obtained? XI. A person, in whom a term of year:

is vested, assigns it to the tenant for life; what is the effect upon the term? XII. In what case can a settlement made after marriage upon a wife and children be set aside? XIII. If a person makes his will and afterwards marries, what effect has the marriage upon the will? XIV. If a person, who is tenant for life of property under a will, dies before all the instalments of the succession duty are paid, what is the effect with regard to the unpaid instalments, and what the effect where the person who is entitled to the fee simple dies before all the instalments are paid? XV. In a settlement of real and personal estate, what powers would you recommend to be given to the trustees with regard to each kind of property?

EQUITY AND PRACTICE OF THE COURTS.

I. State the several proceedings which may be adopted by a creditor who finds it necessary to resort to a court of equity to enforce the payment of a debt due from his deceased debtor, and the usual stages of such proceedings. II. In moving for a special injunction before answer, what is required on the plaintiff's part? And state the course of proceeding. III. State the several stages of appeal in proceedings in courts of equity from decisions of the chief clerks upwards to the House of Lords, and whether any, and what, measures may be taken to lessen the number of those stages. IV. State the course of proceeding for compelling the production (for the purpose of inspection) of documents in the defendant's possession, which are considered material to the plaintiff's case, and the earliest time when such proceedings may be taken. V. Can a married woman bind herself by contract in equity, in any and what case? VI. A father refuses to allow the mother access to their infant children; will a court of equity interfere on her behalf, and whether in exercise of its own jurisdiction or of authority given by statute? VII. A. contracts for the sale of an estate to B., and refuses to fulfil the contract; state the remedies which B. has at law and in equity, explaining the difference between them and the principles upon which the remedy offered by a court of equity is founded. VIII. Your client buys an estate; on the investigation of the title it appears that the vendor cannot make a good title to a small field detached from the rest of the property, and not of any material consequence to your client, who, however, wishes to be off his bargain; will a court of equity compel him to fulfil his contract, and upon what terms? IX. At the time of marriage a wife is entitled to a beneficial lease for years, and she outlives her husband. Can the husband sell the lease during the coverture without her consent, and if it is not sold, to whom will it belong on the death

of the wife? X. A lessee of a farm is under covenant not to plough up meadow land, or to remove hay or straw off the farm; the lessee takes steps which indicate the intention to plough up meadow, or to remove hay or straw; what remedy, if any, has the lessor in equity? XI. On the offer of the late East Indian Loan, A. tendered, in writing, to take £100,000 at 102 per cent., and the company, in writing, accepted the tender, but A. refused to complete the bargain. Will a court of equity enforce the fulfilment of the contract? State the reason for your answer. XII. A. lends money to B. on a deposit of title deeds, and an agreement to execute a mortgage with power of sale; B. fails to pay the money or to execute the mortgage, and A. wishes to sell the property; can he sell under the power before the mortgage has been executed? XIII. Will a court of equity decree the specific performance of a covenant to invest money in lands, and to settle them in a particular manner? XIV. State the nature of a wife's equity to a settlement—the cases in which it arises, and the manner in which it is enforced. XV. The 5th volume of Macaulay's "History of England" is published during the long vacation, after the courts have risen. A bookseller publishes a pirated edition; the owner of the copyright seeks your advice on his remedy. State the course which you would advise him to adopt, so far as the injury is remediable in equity; the proceeding, step by step, for obtaining such a remedy; and the time within which it can be obtained.

BANKRUPTCY AND PRACTICE OF THE COURTS.

I. What classes of persons are liable to be made bankrupts, and can obtain the benefit of the laws made for their relief? II. What are the special circumstances necessary to bring an attorney or solicitor within the action and relief of the bankruptcy laws? And state any peculiar acts of misconduct which would preclude from the relief to which under ordinary circumstances, he might look. III. Define shortly the principal acts of bankruptcy necessary to support a fiat. IV. Can an insolvent trader cause himself to be made a bankrupt? And if so, what is the usual course taken for that object? V. State briefly the steps by which a fiat in bankruptcy is obtained under ordinary circumstances, and particularly the necessary qualification of the petitioning creditor. VI. How and at what meetings are debts proved, and how do corporations and public companies (distinguishing chartered from other companies) prove their debts? VII. Have any, and what, classes of debts or creditors priority of claim on a bankrupt's estate? VIII. A bankrupt being lessee of premises which

his assignees consider of no value, what steps should be taken by the assignees to relieve the estate of the bankrupt from such lease;—by the bankrupt, to relieve himself from future personal liability under such lease;—and on the part of the landlord, to secure his rights up to recovery or receipt of possession. IX. Are the creditors of a bankrupt entitled under any, and what, circumstances, to any property to which a bankrupt may become entitled after his bankruptcy, and before or after certificate? X. State under what circumstances a settlement made by a trader before bankruptcy would be valid, and under what void? XI. Does the law make any distinction between the bankrupt's own property settled on himself for life, and the property of his wife settled on him until bankruptcy or insolvency? XII. State shortly the nature and object of the certificate, the method of obtaining it, some of the chief grounds on which its allowance may be opposed, and what acts (if any) would render a certificate void? XIII. To what notice of an adjudication of bankruptcy is a trader entitled, and within what time may such adjudication be disputed by him? XIV. A trader having been wrongfully made bankrupt—state his remedy against the person by whom the fiat was sued out. XV. To what tribunal does an appeal lie in cases of bankruptcy? and state shortly the course of proceeding by appeal.

CRIMINAL LAW AND PROCEEDINGS BEFORE MAGISTRATES.

I. How many kinds of sessions of the peace are there? And what are the times of holding quarter sessions of the peace? II. What change has lately been made in the summary jurisdiction of magistrates in petty sessions in cases of larceny? III. Is there any appeal from the determination of magistrates in petty sessions? And if yes, to what tribunal? And what steps must be taken by the appellant? IV. What is the legal number, and what are the functions and powers of a grand jury? and what alteration has lately been made in administering the oath to witnesses who appear before them? V. What is the prosecutor's and what the prisoner's right of challenge in felonies and misdemeanors? VI. State when a private person may arrest another, and under what circumstances, and how far he may use force in resisting crime, or in arresting the person who is committing it? VII. Describe the duty of an attorney for a prosecution in preparing a brief for counsel. VIII. Is the finder of lost goods, who appropriates them to his own use, guilty of an indictable offence? If yes, in what cases? IX. What evidence is necessary to convict a receiver of stolen goods where the

thief has been already convicted? X. What is the difference between housebreaking and burglary, manslaughter and murder, wounding with a felonious intent and unlawfully wounding? And upon what indictment can a person be convicted of unlawfully wounding? XI. What evidence is required in support of a prosecution for perjury? And why? XII. Define conspiracy. XIII. What are accessories before the fact, and how has the law respecting them been recently altered? XIV. If a person is indicted at sessions for housebreaking, and upon its appearing that the offence amounted to burglary, the court directed an acquittal, and order him to be indicted at the assizes for burglary, is the plea of *autrefois acquit* a good plea to such indictment? XV. If A. in London consigns goods to B. in Liverpool, and delivers them to C., a carrier, to be conveyed by him to B., and the goods are stolen on the way, in what county or counties would you lay the venue in an indictment for the larceny, and in which of the three persons could the property in the goods be alleged to be?

EXAMINATION ANSWERS. (Easter Term, 1868).

COMMON LAW (*ante*, p. 398).

I. *Local and transitory actions*.—Local actions are those in which the plaintiff must lay his venue in a particular county with a view to the trial being had in that county. Transitory actions are those in which the plaintiff has the option to lay his venue in any county. Local actions are the remaining real actions, ejectment, trespass *quare clausum fregit*, and actions of covenant on the privity of estate. Most other actions are transitory (First Bk. 266; 3 L. C. 188; 3 Steph. Com. 451, 452, 4th edit.).

II. *Infant*.—An infant may bring an action, but before declaring he must have a next friend or guardian appointed; this is chiefly for the purpose of securing payment to the defendant of any costs.

III. *Joint obligors in bond*.—If one of two joint obligors in a bond die leaving executors, the survivor only can be sued at law (Browne, 124; 2 W. Saund. 51, n. 4).

IV. *Guarantee*.—A guarantee need not now express the consideration (19 & 20 Vic. c. 97, s. 3; 3 L. C. 90). It will now therefore suffice if the document merely states that the party signing will pay the debt if the debtor do not. It will, for the reasons stated in Princ. Com. L. 153, be better to leave out any mention of consideration.

V. *Trover and detinue*.—The difference between trover and detinue is that trover lies for the recovery of damages for the detention of goods, whilst detinue

lies for the recovery of the goods in specie (First Bk. 247, 248; 3 Steph. Com. 514, 515, 4th edit.; 3 L. C. 281; *Caunse v. S.*, 7 Man. & Gr. 903; 17 & 18 Vic. c. 125, s. 78).

VI. *Debt on mortgage deed*.—This is rather a singular question to ask, especially as the distinction of forms of action has been abolished for most practical purposes (1 L. C. 65; First Bk. 238). Debt might have been brought to recover the principal and interest over-due in a mortgage deed. So might covenant (see *Browne*, 245). Indeed, some mortgage deeds omit a covenant to pay interest subsequent to the day appointed for payment of the principal; as the subsequent interest does not strictly form part of the debt; it can be recovered as damages only.

VII. *Specialty and simple contract*.—A specialty is a debt under seal; whilst a simple contract is one by mere writing or without any writing (see *Key Exam. Com. L.* pp. 32, 33; 3 Steph. Com. ch. 5; 3 L. C. 8, 181, 188, 239).

VIII. *Statute of Limitations*.—Specialties are barred at the end of twenty years, and simple contracts at the end of six years, unless there be some disability or part payment, or an acknowledgment &c. (*Key Com. Law* 76—80; 3 L. C. 8, 89, 91, 157, 305; 3 Steph. Com. 528, 539, 2nd edit.; First Bk. 268).

IX. *Set-off*.—There can be no set-off in the case put in this question, for it is a rule that the debt sued for and the debt intended to be set off must be mutual and due in the same right (1 L. C. 327; First Bk. 269; see *Gordon v. Ellis*, 15 L. J. N. S. C. P. 178).

X. *Attesting witness*.—An attesting witness to a deed or other document need not be called unless attestation be requisite to the validity of the document (*C. L. P. Act*, 1854, s. 26; 1 L. C. 158, 434; First Bk. 272; 3 Steph. Com. 615; 4th edit.).

XI. *Defence after plea*.—Where a defence arises after plea and before verdict, a defendant may avail himself of it by a plea of *puis darrein continuance*, which must be put in upon affidavit that the defence arose within eight days before plea, unless dispensed with by order (15 & 16 Vic. c. 76, s. 69; 3 L. C. 188, 189; 3 Steph. Com. 578, note, 4th edit.).

XII. *Documentary evidence*.—A party to an action having documents intended to be given in evidence should, to entitle him to the costs of proof, serve a notice to admit them on the opposite party (*R. G. H. T.* 1853, pl. 29, 30; First Bk. 272, 273; 1 L. C. 51; 3 L. C. 190, 296).

XIII. *New trial—New notice to admit*.—On a new trial, the old notice to admit will suffice as to the documents admitted (2 L. C. 296).

XIV. *Nonsuit nolens volens*.—A plaintiff in the superior courts cannot be nonsuited against his will.

If he be nonsuited he may bring a fresh action for the same matter; otherwise if a verdict be entered for the defendant (3 L. C. 190; 4 Bing. N. C. 83; 3 Steph. Com. 623, 4th edit.).

XV. *Tender—Conditions*.—A tender accompanied with a mere condition not affecting the creditor's rights *ultra* is good; otherwise if the conditions be such as if complied with would affect the creditor's rights (3 L. C. 190; *Selw. N. P.* 158, 11th edit.; 5 M. & W. 306).

CONVEYANCING (*ante*, p. 398).

I. *Conveyance by feme covert*.—A married woman must acknowledge her conveyance of real estate, and her husband must concur in the deed, unless dispensation granted (3 & 4 Will. 4, c. 74; 1 Steph. Com. 475, 557, 4th edit.; *Key*, *Convey.* 94, 95; *Lassence v. Tierney*, 14 Jur. 182).

II. *Power of attorney by trustee*.—A trustee cannot empower another person, even by power of attorney, to act for him in the trust: for the trust is a delegated office, and the maxim is "*Delegatus non potest delegare*" (*Princ. Com. L.* 50).

III. *Legatee dying in lifetime of testator*.—By sec. 33 of the 1 Vic. c. 26, where a devise or bequest is made to a child or other issue of the testator (for an interest not determinable at the death of such child or issue), who shall die in the testator's lifetime, leaving issue, which issue shall be living at the testator's death, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (1 Steph. Com. 560; *Mower v. Orr*, 13 Jur. 421; *S. C.* 7 Hare, 473; *Griffiths v. Gale*, 12 Sim. 327; *S. C.* 8 Jur. 235; *Johnson v. Johnson*, 3 Hare, 157; *S. C.* 8 Jur. 77). The issue is not substituted: he is the motive but not the object (*Winter v. Winter*, 11 Jur. 10).

IV. *Death of illegitimate person*.—If an illegitimate person die intestate leaving no issue or wife, his personal estate belongs to the Crown, as also his real estate, except as to copyholds which belong to the lord of the manor (2 Steph. Com. 304, 305, 4th ed.; 1 Id. 435).

V. *Protector of settlement*.—The party to be protector of a settlement, whether made subsequently or prior to the statute for the abolition of fines and recoveries (3 & 4 Will. 4, c. 74), is pointed out in that statute; by sec. 22 the owner of the first existing estate under a settlement, being an estate for years determinable on the dropping of a life (no rent being reserved, s. 26), or any greater estate (not being an estate for years), prior to an estate tail under the same settlement, is to be the protector of the settlement. Each of two or more owners of a prior estate

is to be the sole protector as to his share (sec. 23). But it is provided, that where already, on or before the 31st day of December, 1833, an estate under a settlement shall have been *disposed of*, either absolutely or otherwise, and either for valuable consideration or not, the person who in respect of such estate would, if this act had not been passed, have been the proper person to have made the tenant to the writ of entry, or other writ for suffering a common recovery of the lands entailed by such settlement shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry, or other writ, be the protector of such settlement (sec. 29). And there is a similar provision for the case of a disposition of a reversion or remainder prior to 31st of December, 1833 (s. 30; Hayes' Convey. 157, 159, 4th edit.). And the settlor may expressly (s. 32) appoint a protector. In the case of settlements prior to the above statute, a *bare trustee* who would have been the proper person to make a tenant to the writ of entry, &c., shall, during the continuance of the estate conferring on him the right to make the tenant to such writ of entry, be the protector of such settlement (see ss. 27 & 31; and on the discrepancy as to dates, see Hay. Convey. 158, 160, 4th edit.).

VI. *Protector lunatic, &c.*—Where the protector of a settlement is lunatic, idiot, or of unsound mind, the Lord Chancellor, &c., or other person intrusted by the sign manual with the care, &c., of lunatics, &c., is the protector in the place of the lunatic, &c. (First Book, 38, 184; Re Blewitt, 2 Jur. N. S. 217; 1 Steph. Com. 580, 4th ed.; Browell's R. P. 92, 93).

VII. *Disposition without protector*.—A deed of disentanglement where the protector's consent is necessary, but not given, bars the issue only of the tenant in tail, and not persons in remainder, &c. (3 & 4 Will. 4, c. 74, ss. 15, 34). Time may render it valid against the remainder-man (3 & 4 W. 4, c. 27, s. 23; Browell, 98, 94; 1 Steph. Com. 578, 579, 4th ed.).

VIII. & IX. *Intestacy—Real and personal estate.*—The two daughters of the elder son will take all the real estate to the exclusion of the younger son; the son will take one moiety of the personal estate, and the two daughters the other moiety between them: in each case they represent their father, and take what he would have had. In the case of an eldest son surviving, he takes the real estate and one moiety of the personalty, the children of the deceased son take the other moiety equally.

X. *Death of executor intestate.*—Where an executor dies intestate, administration to the original testator must be taken out limited to the goods *not administered* (2 Steph. Com. 209, 4th ed.).

XI. *Term vested in tenant for life.*—If a term of years in certain property be assigned to the tenant

for life, it is merged, if there be no intervening estate (Co. Litt. 338; Fearn, 341, 9th ed.; First Bk. 152, 153, 174).

XII. *Settlement, post-nuptial.*—Settlements made without any consideration whatever, or even those made for good, though not for valuable consideration, are said to be *voluntary*; and by force of the statute 27 Eliz. c. 4 (made perpetual by 39 Eliz. c. 18, s. 31), voluntary settlements are void as against *bona fide purchasers*, and also void by 13 Eliz. c. 5, as against creditors, where the settlor is indebted at the time (Bacon's Abr. tit. Fraud, C.; 1 Steph. Com. 462, 1st ed.; Pott v. Todhunter, 9 Jur. 589; Lister v. Turner, 10 Jur. 752; 2 Black. Com. 296; Richards v. Lewis, 15 Jur. 512; Skarff v. Soulby, 13 Jur. 1109; 2 L. C. 309; 1 L. C. 167—170, 304).

XIII. *Will, marriage.*—Marriage merely is an absolute revocation of a will (1 Vic. c. 26, s. 18; ante, p. 386, which must be taken as applying to the circumstances there stated).

XIV. *Succession duty, death, instalments.*—In the case of the tenant for life, the instalments not due at his death would cease to be payable; in the case of the tenant in fee-simple, the instalments unpaid at his death are a continuing charge, and payable by the owner for the time being of the property (16 & 17 Vic. c. 51, s. 21; Shelf. Duties, 229, 230).

XV. *Settlement—Powers to trustees.*—The powers to be inserted in settlements depend very much on the nature of the property, and the mode in which it is settled, and it is very difficult, especially in the case of personality, to say what powers, beyond the very ordinary ones, should be inserted. With respect to real estate there should be powers of leasing (usually to tenant for life, or with his consent, during his estate), selling, exchanging, enfranchising, and partitioning; the powers of selling, exchanging, or enfranchising, being accompanied by directions to lay out the proceeds in the purchase of lands to be settled in the same manner as the original lands, with sometimes a discretionary power, with consent to discharge incumbrances. In the meantime, the money is directed to be invested in the public funds or on mortgage, with powers to vary. In the case of personality, if not money in the funds, there is often a provision for conversion, and then for investment, either on real security or in the public funds, with powers to vary. If renewable leaseholds be settled, there should be powers to renew, and to apply any monies derived from any sources to pay the fines and expenses; if no other, their power to raise moneys by way of mortgage. Where the money settled is due from the husband on his covenant, the trustees should be expressly authorised to allow the money to remain until requested by cestui que trust to call same in. The usual

trustees clauses should be inserted in both kinds of settlements—that is, for the appointment of new trustees, their indemnity, reimbursement, settle accounts, and arrange disputes and receipt clause.

BANKRUPTCY (*ante*, p. 000)).

I. *Traders*.—The classes of persons liable to be made bankrupts, and who can obtain the benefit of the bankruptcy laws, are traders within the meaning of the bankruptcy statutes, which specify particular traders and have also some general provisions applying to persons using the trade of merchandise by way of bargaining, &c., or seeking their living by buying and selling, &c. (First Bk. 214, 215; 3 L. C. 28, 192; 1 L. C. 75, 140—145, 440; 2 Steph. Com. 147—150, 4th edit.).

II. *Attorneys*.—An attorney is not a trader within the meaning of the bankruptcy acts, unless he act as a scrivener, that is, if he make it a part of his business to receive other men's moneys or estates into his trust or custody for the purpose of laying them out in securities (1 L. C. 141, 262, 333; exp. Gem, 5 Jur. 683; exp. Dufaur, 21 L. J. Bank. 38; Wise's Bank. 58—60, 2nd edit.). The same acts of misconduct which if committed by an ordinary trader would preclude him from the relief of the bankruptcy laws, will also preclude an attorney from such relief (see *Ans.* XII.).

III. *Principal acts of bankruptcy*.—The reader is doubtless well aware that though the examiners mention flats here and elsewhere, they have long since been abolished (*Key Bank.* pp. 2, 10, 43). The following are the principal acts of bankruptcy:—1, departing the realm; 2, remaining abroad; 3, departing from dwelling-house, or otherwise absenting; 4, beginning to keep house; 5, suffering to be arrested or taken in execution; 6, suffering to be outlawed; 7, procuring to be arrested or taken in execution, or goods, &c., to be taken in execution, &c.; 8, making any fraudulent grant, gift, or transfer of lands, or chattels; 9, lying in prison for twenty-one days after arrest or detention for debt; 10, escaping out of prison; 11, compounding with the petitioning creditor for his debt, to the prejudice of the other creditors; 12, filing a declaration of insolvency; provided a petition for adjudication be filed within two months; 13, filing a petition in the Insolvent Debtors' Court, if an adjudication be obtained before the time appointed for hearing, or within two months from the making of the vesting order; 14, filing a petition for private arrangement if it be dismissed, and the petition for adjudication be filed within two months thereafter; 15, an assignment for the benefit of creditors even if executed and advertised, as by s. 68 of the Consolidation Act is required, if there be a petition within three

months; 16, not paying, securing, or compounding within seven days after demand, a debt or demand arising by judgment, decree, or order in equity, bankruptcy, or lunacy; 17, not paying, securing, or compounding a debt within seven days after being summoned to the bankruptcy court on an affidavit of the debt, and service of particulars, and of notice requiring immediate payment of the debt; 18, a trader, being a member of Parliament, not paying or compounding within one month after service of a writ of summons (an affidavit of the debt having been filed), or not entering into a bond, with sureties, and thereupon entering an appearance. For more detailed information, see 1 L. C. 189—199, 223—229, 251—258, 262, 334, 440; 3 *Id.* 27—29.

IV. *Trader making himself bankrupt*.—An insolvent trader may cause himself to be made a bankrupt. The usual course is to file a declaration of insolvency. Assets to the amount of £150 must be shown (First Bk. 217; *Pennell v. B.*, 18 C. B. 209; 1 L. C. 136, 379, 380).

V. *Obtaining adjudication*.—The reader will substitute the word "adjudication" for "flat," erroneously used by the examiners. In order to procure an adjudication in bankruptcy, a petition must be presented, in the form given in one of the schedules to the 12 & 13 Vic. c. 106, by a creditor to a proper amount. Within seventeen days thereafter—i. e., the three days in which the petitioning creditor has priority, and fourteen days thereafter (unless the time has been specially enlarged), there must be proof of the debt of the petitioning creditor, or other creditor prosecuting the petition, of the trading, and of the act of bankruptcy. The petitioning creditor must personally attend to prove his debt, unless on special cause shown his attendance is dispensed with (Rule 12). The commissioner must examine into the nature and consideration of the debt, and before declaring the party a bankrupt, must cause to be entered on the proceedings a deposition of such petitioning creditor stating the nature and amount of the debt due, and how, and for what consideration the same arose, together with the particular time or times the same became due (see Rule 11). The trading and act of bankruptcy must be proved. Witnesses may be summoned to give evidence though on special cause shown their attendance may be dispensed with (Rule 12; 12 & 13 Vic. c. 106, s. 100). After the proofs of the petitioning creditor's debt, and of the trading and act of bankruptcy by the party against whom the petition was filed, the commissioner may adjudge such person bankrupt, of which he is to have notice before it is advertised (*Mont. & Ayr. Pract.* chap. 11; *Eden's Bankr. Law*, chap.

5; 12 & 13 Vic. c. 106, s. 101). A single petitioning creditor's debt must amount to £50 (1 L. C. 262, 284—289, 319—325, 355—359; First Bk. 217).

VI. *Proof of debts—Meetings—Companies.*—Debts may be proved at the two public meetings appointed by the commissioners for the bankrupt to surrender and conform, or at any adjourned meeting, and likewise at every other meeting appointed by them for proof of debts, whereof ten days' notice shall have been given in the *Gazette*. The proof may also be made at any dividend meeting, and likewise at a meeting called at the creditors' expense for such proof. By sect. 28 of the Consolidation Act, the commissioner may direct a registrar to take proof of debt (12 & 13 Vic. c. 106, s. 164; Mont. & Ayr. Bankr. Pract. c. 12, s. 1). If any creditor live remote from the place of the meeting of the commissioners, he may prove by affidavit, sworn before a person authorised to administer an oath in bankruptcy matters. It has been held that though the 164th section of the Consolidation Act does not provide for proof by affidavit, and there is no express provision in the act dispensing with personal attendance, creditors in the country may prove by affidavit. Bodies politic and public companies incorporated, or authorised to sue or bring actions either by charter or act of Parliament, may prove by an *agent*. Such agent must in his deposition swear that he is such agent, and that he is authorised to make such proof (12 & 13 Vic. c. 106, s. 164).

VII. *Priorities of creditors.*—One year's assessed taxes must be paid; if the bankrupt has been an officer of a friendly society, and has moneys belonging to the same in his hands, the commissioner may order same to be paid over to the society, as also the payment out of his estate of moneys remaining due in respect of funds received by the bankrupt for such society. The servants and clerks of the bankrupt are entitled to so much of their wages as do not exceed three months, and not being more than £80. The wages of the bankrupt's labourers and workmen are to be paid to the extent of 40s. each. The commissioner may also order any sum to be paid out of the estate in respect of apprentice fees received by the bankrupt with an apprentice (see 12 & 13 Vic. c. 106, ss. 166—170).

VIII. *Lease of premises.*—The leaseholds of the bankrupt do not vest in the assignees by virtue of their appointment; at least, not so as to render them liable, though they may accept the same if they please. The assignees, however, are not bound to take any steps with regard to the leaseholds, until the landlord or the bankrupt obliges them either to accept or reject same. This is by virtue of

sec. 145 of the Consolidation Act, which enacts that if the assignees of any bankrupt having or being entitled to any lease or agreement for a lease, shall *elect* to take such lease or agreement for a lease, as the case may be, the bankrupt shall not be liable to pay any rent accruing after the issuing of the fiat or filing of the petition for adjudication of bankruptcy against him, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements in any such lease or agreement. If the assignees shall *decline* to take such lease or agreement for a lease, the bankrupt shall not be liable, if within fourteen days after he shall have had notice that the assignees have declined, he shall deliver up such lease or agreement for a lease to the person then entitled to the rent or having so agreed to lease, as the case may be. If the assignees shall *not* (*upon being thereto required*) *elect* whether they will accept or decline such lease or agreement for a lease, any person entitled to such rent, or having so agreed to lease, or any person claiming under him, shall be entitled to apply to the court, and the court may order them to elect, and deliver up such lease, or agreement for a lease, in case they shall decline the same and the possession of the premises, or may make such other order therein as it may think fit. It has been decided by Commissioner Hill that the assignees of a bankrupt who have declined a lease may be compelled to deliver it up to the bankrupt (Anon. 18 Law Tim. Rep. 42).

IX. *After-acquired property.*—All the bankrupt's future personal estate, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him *before* he shall have obtained his certificate, and all such lands, tenements, and hereditaments as he shall purchase, or which shall descend, be devised, revert to, or come to such bankrupt before he shall have obtained his certificate, will belong to the assignees (12 & 13 Vic. c. 106, ss. 141, 142).

X. *Settlement.*—A settlement by a trader made before bankruptcy, and in consideration of a *future* marriage, is valid, even if the husband were then indebted, and even if the property were his own and not his intended wife's (2 Madd. Chanc. Prac. 368; *Simmonds v. Edwards*, 11 Jur. 592; S. C. 16 Mees. & Wels. 838). But a settlement after marriage (not being in pursuance of written articles prior thereto, which is, indeed, the same as an actual settlement) by a trader being at that time greatly in debt, or becoming so shortly afterwards, is invalid as against the creditors and the assignees unless supported by a valuable consideration (*Pott v. Todhunter*, 9 Jur. 589; S. C. 2 Coll. C. C. 76; 2 Law Stud. Mag. N. S. Supp. pp. 180, 181). So

much with reference to the bankrupt's own marriage settlement; but in the Consolidation Act there is a provision relating to settlements on his children and other persons (which latter words, it is said, are intended to comprise his wife (*Glaister v. Hewer*, 8 Ves. 204; but see *Colombine v. Penhall*, 1 Sm. & G. 228). This is sect. 126 (which is the same as sect. 73 of the 6 Geo. 4, c. 16), and it enacts that if any bankrupt being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration) have conveyed, assigned, or transferred to any of his children, or to any other person any hereditaments, offices, fees, annuities, leases, goods or chattels, or have delivered or made over to any such person any bonds, bills, notes, or other securities, or have transferred his debts to any other person, or into any other person's name, the commissioners may, notwithstanding, effectually sell and dispose of the same for the benefit of the creditors under the bankruptcy; and every such sale shall be valid against the bankrupt, and such children and persons, and against all persons claiming under him.

XI. Settlement until bankruptcy.—The law does not allow a settlement of the property of a trader on himself until bankruptcy, and then over to be effectual; but if it were of the wife's or third person's property, it would be good (see 7 Bart. Preced. 448, 449, notes; exp. *Hinton*, 14 Ves. 598; *Higginbotham v. Holme*, 19 Ves. 88).

XII. Certificate, object, obtaining, opposing, avoiding.—The certificate of a bankrupt is an authentic document certifying that the bankrupt has duly conformed to the bankrupt laws, and its object is to free him from future liability of body and goods in respect of the debts proveable under the bankruptcy. Before a bankrupt applies for his certificate he must have passed his last examination (12 & 13 Vic. c. 106, s. 198). The commissioner acting in the prosecution of the bankruptcy grants the certificate of conformity, but any creditor may be heard to oppose same on giving three clear days' notice of his intention to oppose. In order to obtain a certificate the court (commissioner) appoints a public sitting for the allowance thereof; an advertisement thereof is then inserted in the *London Gazette*, and notice thereof given to the solicitor of the assignees, twenty-one days before the sitting. The assignees, or a creditor, having given due notice, are then heard to oppose, and the court either grants, or refuses to grant, or suspends the certificate (2 Chron. 271). The certificate, if granted, may be (1) one of a first class, which is granted where the bankruptcy has arisen from unavoidable losses and misfortunes; or (2), one of a second class — i. e., where the bankruptcy has not wholly arisen from unavoidable losses and misfortunes;

or (3), the certificate may be of a third class, which is where the bankruptcy has not arisen [in any part] from unavoidable losses or misfortunes (see 12 & 13 Vic. c. 106, s. 199, and Schedule Z). The creditors are not confined in their objections by any restrictive words, but are left quite unlimited, and, any of the causes for invalidating a certificate are sufficient grounds for opposing the allowance. Among the ordinary grounds of opposition are: fraud, concealment, knowingly permitting a fictitious debt to be proved; concealing, destroying, or falsifying books; concealing property; gambling, or stock-broking, against the provisions of the statute; or giving money, or security for money, to any creditor to forbear opposing. Where no dividend has been made it is a circumstance of suspicion, and for requiring explanation. Where there has been any fraud practised on the part of the bankrupt, with a view to obtaining his certificate, it will be a valid objection (see 12 & 13 Vic. c. 106, ss. 201, 256, 207). A certificate, though granted, will be void if any of the matters stated in s. 201 of the Consolidation Act have occurred—that is, if the bankrupt has lost by gaming in one day £20, or within a year of his bankruptcy, £200, or £200 by stock-jobbing; or after an act of bankruptcy has concealed or destroyed his books, &c., or made fraudulent entries therein; or has concealed part of his property, or permitted a fictitious debt to be proved.

XIII. Adjudication—Notice of.—Previous to the notice of adjudication appearing in the *London Gazette*, a duplicate of such adjudication must be served on the person so adjudged bankrupt, personally, or by leaving the same at the usual or last known place of abode or place of business of such person. The party so served is allowed seven days, or such extended time, not exceeding fourteen days, as the court shall allow, from the service of such duplicate of such adjudication, to show cause to the court against the validity of such adjudication. On appeal to Lords Justices, the advertisement may be further stayed (2 Law Stud. Mag. N. S. p. 3). If the petitioning creditor's debt, the trading, or the act of bankruptcy appear insufficient, and none other be proved, the adjudication is to be annulled; but if no cause be shown for annulling the adjudication, the notice of adjudication is to be forthwith advertised, and sittings appointed for bankrupt to surrender and conform (12 & 13 Vic. c. 106, s. 104). There is a further time allowed after the adjudication is advertised.

XIV. Wrongful adjudication.—If the petition have been improperly or maliciously filed, the court may, upon the petition of the party against whom it was filed, order satisfaction to the party for the damages by him sustained (12 & 13 Vic. c. 106, s. 267; *Wydown's case*, 14 Ves. 90; 7 Term Rep. 300).

Formerly (6 Geo. 4, c. 16, s. 13) the bond which was then given by the creditor might have been assigned to have enabled the trader to sue on it; but there is no bond now given under the Consolidation Act. Sec. 267 of this act enacts, that "if the debt stated by the petitioning creditor in his petition for adjudication, and verified by affidavit to be due to him from any trader, shall not be really due, or if after the petition for adjudication of bankruptcy filed it shall not have been proved that the person against whom such petition filed had committed an act of bankruptcy, and was a trader at the time of the filing of such petition, and it shall also appear that such petition was filed fraudulently or maliciously, the court shall and may, upon petition of the person against whom any such petition was so filed, examine into the same, and order satisfaction to be made to him for the damages by him sustained." The bankrupt may, instead of proceeding on this statute (so it was decided on previous acts), bring an action for falsely and maliciously filing the petition for adjudication (*Chapman v. Pickersgill*, 2 Wilson, 145; 3 Burr. 1418; *Holmes v. Wainwright*, 1 Swanst. 124).

XV. *Appeal*.—There is an appeal given by the Bankruptcy Consolidation Act in all cases in which the commissioners exercise primary jurisdiction. By the 14 & 15 Vic. c. 83 (the Act to Improve the Administration of Justice in Chancery), s. 7, this appeal is to be made to the Court of Appeal in Chancery, and the appeal given by the Consolidation Act to the Lord Chancellor is taken away. There may, however, be an appeal from the Court of Appeal in Chancery to the House of Lords, but only "on matters of law or equity, or on the rejection or admission of evidence." The form of appeal to the Court of Appeal in Chancery must be by way of petition, motion, or special case (12 & 13 Vic. c. 106, s. 14); to the Lords the appeal must be on a special case approved and certified by one of the judges of the Court of Appeal (14 & 15 Vic. c. 83, s. 10; 1 Law Chron. 302, 348).

CRIMINAL LAW (*ante*, p. 000).

I. *Sessions*.—Sessions are either petty or general. These latter are usually called quarter sessions. There are also special sessions for the divisions of counties to transact particular descriptions of business (2 Steph. Com. 655, 4th edit.; First Bk. 88, 89, 374, 375). By the 1 W. 4, c. 70, s. 35, the quarter sessions (except in Middlesex) are appointed to be kept in the first week after the 11th October, 28th December, 31st March (or other day between 7th March and 22nd April), and 24th June (4 Steph. Com. 382 4th edit.).

II. *Summary jurisdiction in larceny*.—The 18 & 19

Vic. c. 126, gives justices in petty sessions a summary jurisdiction to try, by the consent of the prisoner, charges of *larceny*, where the value of the property stolen does not exceed *five shillings*, and attempts to commit larceny, and, as we shall presently see, there is an enlarged jurisdiction in cases of simple larceny of goods *above* the value of five shillings, or stealing from the person, or larceny as a servant or clerk, but this is only in the event of the *accused pleading guilty*. The jurisdiction conferred by the act may be thus stated:—Magistrates in petty sessions are empowered, by consent of the prisoner, to adjudicate summarily upon charges of *simple larceny*, if the value of the whole of the property alleged to have been stolen does not in their judgment exceed five shillings, and upon charges of *attempts to commit larceny from the person, or simple larceny*. If they find the offence proved, they may commit the offender to the common goal, or house of correction, to be imprisoned, with or without hard labour, for any period not exceeding *three calendar months*; and if they find the offence not proved, they are to dismiss the charge, and deliver to the person charged a certificate of such dismissal. There are three cases, however, in which this summary jurisdiction is not to be exercised by the justices. First, if the person charged do not consent thereto. Secondly, if it appear to the justices that the offence is one which, owing to a previous conviction, is punishable by law with transportation [penal servitude]; and, thirdly, if they are of opinion that the charge is, from any other circumstances, fit to be made the subject of prosecution by indictment. In any of the above three cases the justices are to deal with the charge in all respects as if the act had not been passed.

III. *Appeals—Petty sessions*.—The 20 & 21 Vic. c. 43, allows an appeal against any conviction or order of magistrates to *one of the superior courts of common law*, upon the ground that it is erroneous in point of law (4 L. C. 142—141). The magistrates may refuse to allow the appeal (except where the application is made under the Attorney-General's direction), if they are of opinion that the application is merely frivolous; but even then the appellant may apply to the Court of Queen's Bench for a rule calling upon them to show cause why the appeal should not lie. The form of the appeal is by special case, which is stated and signed by the justices, provided the application for that purpose is made to them in writing, and security to prosecute, &c., given within three days from their decision. The appellant, on receiving the case, must give a copy thereof, and notice of appeal, to the respondent, and transmit the case itself (without certiorari) to the superior court within three days after he, the

appellant, has received it. The superior court, decides the case, having power over the costs, and the decision is enforced by the magistrates. The statute does not provide for appeals on matters of fact: these, therefore, remain almost as before, and will lie only when expressly allowed by statute, and then to the quarter sessions. The only alteration made as to such appeals is, that they will be taken to have been abandoned when an appeal on point of law is made under this statute.

IV. *Grand juries*.—A grand jury must consist of twelve at least, and not more than twenty-three (2 Hale's P. C. 161). The grand jury, after being charged, withdraw to sit and receive indictments which are preferred to them in the name of the king, but at the suit of any private prosecutor; they are only to hear evidence on behalf of the prosecution, for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined, and the grand jury are only to inquire upon their oaths whether there be sufficient cause to call upon the party to answer it (4 Black. Com. 302). By the 19 & 20 Vic. c. 54, witnesses examined before grand juries are to be sworn in the presence of the jurors, without being sworn in open court (3 L. C. 177).

V. *Challenge of jury*.—The prisoner only has a right in treason and felonies to a *peremptory* challenge; in treason 35, in felony 20 persons. There is also a challenge both by the Sovereign (or prosecutor) and the prisoner for *cause*. There is no limit to this right (Mansell v. Reg. 26 L. J. M. C. 137; 4 L. C. 000).

VI. *Arrest*.—An offender may be arrested without warrant by any private person present at the commission of a *felony*. Such persons may also arrest one reasonably suspected of a felony, though not of a misdemeanor, except it be in the night-time, under the act presently mentioned (see Bowditch v. Balkin, 19 L. J. N. S. Exch. 337). Several statutes give the party injured a power of arresting without warrant, and this where the offence is not of a highly criminal nature, as wilful trespassers, &c. (4 Steph. Com. 388, 389, 2nd edit.). And by s. 11 of the 14 & 15 Vic. c. 19, any person may apprehend persons committing indictable offences in the night, and may convey or deliver them to a constable. The night-time is the same as in burglary. And s. 10 of the same act authorises any person to apprehend persons committing offences against that act. Private persons may, in the case of a felony in *presentia*, justify breaking open doors in pursuit of the felon. So in cases of felony, or dangerous wound given in *presentia*, private persons may justify killing the party who resists or takes to flight to prevent

the arrest, and could not be arrested otherwise (4 Steph. Com. 122, 4th edit.).

VII. *Attorney preparing brief*.—The duty of an attorney for a prosecution in preparing a brief for counsel is to furnish him with a copy of the depositions, and such observations as may be thought necessary for insuring a conviction. Frequently the depositions only are furnished to the counsel.

VIII. *Finding goods*.—When a person finds property, if he at the time knows who is the owner thereof, and does not restore it, this is larceny; but it is not a larceny if the finder did not, at the time of the finding, know, or had not then the means of knowing, who the owner was (Reg. v. Thurborn, 13 Jur. 499; Reg. v. Vincent, 11 Law Tim. Rep. 374; Reg. v. West, 24 Law Journ. M. C. 4; 18 Jur. 1031; 1 Law Chron. 346; 2 Id. 12, 230).

IX. *Receiver—Evidence*.—Where the receiver has been convicted, evidence is given, by an examined copy of the record of the conviction of the principal, as proof of his conviction, and of the commission of the larceny. The offence of receiving is then proved (Archb. Pl. and Ev. 271, 8th edit.; Key Crim. L. 74—79).

X. *Housebreaking and burglary—Manlaughter and murder—Wounding*.—Burglary and housebreaking differ in no other respect than that burglary must be committed in the night time—i. e., after nine in the evening and before six in the morning (1 Vic. c. 86, s. 4). Manlaughter is the unlawful killing of another without express or implied malice, whilst murder is such a killing with malice either express or implied (4 Bl. Com. 176—200; First Bk. 314). Wounding with felonious intent is where the offender seeks to maim, disfigure, or disable the prosecutor, or to do him some grievous bodily harm, or in resisting apprehension, &c. Unlawfully wounding is where it is done maliciously without any such intents. A conviction for the latter offence may take place on an indictment for the former (14 & 15 Vic. c. 19, s. 5).

XI. *Perjury—Evidence*.—In order to obtain a conviction for perjury two witnesses are necessary. This is founded on the reasonableness of requiring more than a mere counter-denial, which one witness only can give, and so there would be only one oath against another (4 Black. Com. 358; Archb. Crim. Plead. and Evid. 155, 568, 8th edit.). However, it will be sufficient that the perjury be directly proved by one witness, and corroborative evidence on some particular point be given by another (Vide R. v. Mayhew, 6 Car. & P. 315; R. v. Yates, ib. 132; R. v. Parker, 1 Car. & M. 639; Reg. v. Roberts, 2 Car. & Kirw. 607); and where the alleged perjury consists in the defendant's having contradicted what he himself swore on a former occasion, the

testimony of a single witness in support of the defendant's own original statement will support a conviction (*R. v. Harris*, 5 B. & Ald. 929; but see *contra*, *Reg. v. Wheatland*, 8 Car. & Pay. 238, *per Gurney, B.*).

XII. Conspiracy.—A conspiracy may be defined as a combination or agreement between several persons to carry into effect a purpose hurtful to some individual, or to particular classes of the community, or to the public at large, but not being a completed felonious purpose (see *Reg. v. Peek*, 9 Adol. & Ellis, 686; 4 Steph. Com. 293, 2nd edit.; First Bk. 805).

XIII. Accessories before fact.—An accessory before the fact is he, that being *absent* at the time of the commission of the felony, procures, counsels, commands, incites, or abets another to commit it. And, whoever procures a felony to be committed, although through the intervention of a third person, without any personal communication with the doer of it, is an accessory before the fact (*Foster*, 125; Com. Dig. tit. "Justices," T. 1). If the crime solicited to be committed be not done, then the adviser can only be indicted for a misdemeanor (2 East's Rep. 5; 4 Black. Com. 37). Accessories *before the fact* may be indicted, tried, convicted, and punished in the same manner as if they were principals (*Key* *Crim. Law*, 78; 11 & 12 Vic. c. 46, s. 1; First Bk. 294).

XIV. Autre fois acquit.—We are informed that there is an express decision on this point, but we have not been able to find it. We are, therefore, left to form our own opinion. The plea of *autre fois acquit* is allowed upon the principle that no man is to be brought into jeopardy more than once for the *same* offence. The point then turns on this: are the offences of burglary and housebreaking the same? and the answer is, they are substantially the same, the only difference being that the former must be committed in the night-time, or what the law defines as such. Thus it is laid down in Arch. Pl. and Ev. by Jervis and Welsby (12th ed. p. 322), and Archb. New *Crim. Proc.* 347, that if the offence of housebreaking be proved to have been done in the night-time, so as to amount to burglary, the defendant may notwithstanding be convicted of the offence of housebreaking (see also *R. v. Pearce*, R. & R. 74; *R. v. Robinson*, Id. 321). It therefore seems that the plea of *autre fois acquit* must be an answer to the charge of burglary, and we can scarcely believe the decision referred to is such as is stated.

XV. Larceny—Venue—Property—Bailment.—In an indictment for larceny, where the goods were stolen on their carriage from London to Liverpool, the venue may be laid in any county through which the coach, vessels, &c., passed in the course of the

journey in which the offence was committed (7 Geo. 4, c. 64, s. 13). The property may be laid either in the owner or the bailee (*R. v. Remnant*, 4 C. & P. 391; Arch. Pl. and Ev. 30, 8th ed.).

NOTICES OF NEW BOOKS.

WHARTON'S ARTICLED CLERKS MANUAL.

A Manual for Articled Clerks: containing Courses of Study as well in Common Law, Conveyancing, Equity, Bankruptcy and Criminal Law, as in Constitutional, Roman-Civil, Ecclesiastical, Colonial and International Laws, and Medical Jurisprudence; a Digest of all the Examination Questions, with the General Rules, Forms of Articles of Clerkship, Notices, Affidavits, etc., and a List of the proper Stamps and Fees: being a Comprehensive Guide to their Successful Examination, Admission, and Practice as Attorneys and Solicitors of the Superior Courts: Eighth Edition. By J. J. S. WHARTON, Esq., M.A. Oxon, Barrister-at-Law, Author of "The Law Lexicon," "An Exposition of the Laws relating to the Women of England," &c. London: Butterworths, 7, Fleet-street. 1858.

In whatever other respects Mr. Wharton may exhibit a deficiency, it certainly cannot be alleged that his title-page is deficient in explicitness. Indeed, it may be said that a mere insertion of it here is as good as a lengthy notice of the work, and perhaps it will convey as precise a notion of what are the contents of the volume, as we could hope to furnish in a much more elaborate statement. The mere fact that it is the eighth edition will suffice for many who are willing to adopt the prevalent notion that success and merit inevitably accompany each other. The scheme of the work, we are informed, is as follows:—"It opens with a section containing admonition as to the method of study, the desirableness of reading upon a plan, and the benefit derivable from a habit of analysis. It debates the comparative advantages of the several means of acquiring knowledge, and suggests a preliminary course of philosophical jurisprudence as profitable for discipline before entering upon the acquirement of technical law. An opinion is given as to the formation of a law-library, and upon many other cognate subjects, and a mode proposed to avoid confusion amidst the rapid and incessant transitions in every branch of our laws.

"A second section contains a description of law, and distinguishes its substantive and adjective provisions. A tabular view of the laws of England is then exhibited, and the order in which I have discussed them laid down.

"In Part I. the Common Law, Conveyancing,

Equity, Bankruptcy and Criminal Law are treated in separate chapters. Summaries of the most prominent subjects are introduced, and the best books and authorities recommended for the purpose of working out their details. To these departments, forming as they do the branches for examination, the articulated clerk is advised to give his earnest diligence.

"An analytical digest of all the examination questions from A.D. 1836 (when the examination for articulated clerks was instituted) to A.D. 1858, follows the corresponding chapters. The question upon repealed laws have been omitted, and repetitions avoided, — notes, however, being added, showing how often a question has been repeated; by these means space has been economised, and confusion arising from abolished subjects obviated. A few of the questions have been slightly altered, either to correct a word or phrase, or to adopt them to recent reforms. New statutes and important cases are frequently quoted to indicate the best sources for acquiring a sound knowledge of the matter of inquiry. A research into these authorities, and the reflections that it must necessarily engender, are worth, in my judgment, infinitely more than any categorical answer, however lucid in arrangement, or complete in circumstantial finish. In the Appendix, p. 655, will be found the examination paper of Hilary Term last, printed exactly as it was placed before the candidates, and this brings up all the questions to the day of my going to press.

"In Part II. several important and interesting departments are treated of.

"Chapter I. sketches our constitutional or organic law, a subject peculiarly demanding the attention of an Englishman in these days of repressive measures, and experimental despotism. To revert to the fundamental principles of our dearly-bought freedom has become essential not only to baffle the insolent efforts of irresponsible authority, but also to keep in remembrance the glorious causes of our prosperity and independence.

"The Roman-civil law, attracting as it does considerable notice, is somewhat elaborately analysed in the second chapter. This analysis is calculated, I hope, since it is meant, to facilitate the study of a jurisprudence, which has furnished a model for many of our own judicial theories.

"The ecclesiastical law is spoken of in the following chapter. A court having been created for the settlement of disputes arising out of probate wills, letters of administration, and the contract of marriage, in which the profession can practice, the subject of this chapter has become of considerable importance, and I have taken pains with it accordingly.

"The rapid development of the colonies, the

augmenting tide of emigration, and the gigantic expansion of our wonderful commerce, have brought the nations of the earth into more active intercommunication, and rendered a knowledge of colonial and international law essential to the English lawyer. The fourth and fifth chapters are, therefore, taken up with these branches. Whilst the former addresses itself to colonial law, the latter debates the law of nations, and the conflict of foreign and domestic jurisprudence, and attempts an epitome of the salient principles, the perusal of which may not, I trust, be altogether unimproving.

"The concluding chapter of this part is on Medical Jurisprudence, a science attractive, as teaching the economy of our physical machinery, and serviceable for the protection of innocence, and the detection of crime. This is surely cause sufficient to justify its admittance for the first time, I believe, into a work embracing the laws of England, national, international, and colonial.

"In reviewing these eleven great topics, it was impossible, within the prescribed limits of the volume, to trace their principles to their minute results, or to follow their practical procedures into their exact details; to have attempted this would have swelled the Manual into an encyclopædia, and inflicted the irksome repulsion of a "big book," as well as defeated the main object of introducing a student, with a short and familiar address, to the several subjects of law-learning.

"Nothing is more desirable, on a first acquaintance with a science, than to render its introduction easy and agreeable, in order to make the tyro feel somewhat at home, so that he may be at ease with the newness of his situation, and become interested with the unaccustomed pursuit. Place in a youth's hands a programme of the proceedings, encourage him to think, and he will quickly abandon his reserve, and enter into the spirit and business of that which is going on around him. It is under these impressions that I have debated the several laws in popular language, and given an analytical result of a theory, so as to show its extent and connection, its phases and technicalities, rather presenting the matter by way of suggestion, than by deducing the several steps of the legal problem. Occasionally a doctrine is elaborated, or a piece of practice fully expounded; but, for the most part, the branches are treated of, and the subjects displayed in classified tables, for the purpose of furnishing a chart whereby a student may conduct his readings and inquiries properly and methodically through the books recommended, as well for perusal as reference.

"An Appendix, concluding the work, shows the career of an articulated clerk, from the time of his entering into the chambers or offices of his principal,

to the period of his standing within the threshold of his profession, prepared to commence his practical life. Precedents of Articles of Clerkship, Assignments of Articles, and Affidavits to enrol them, are here given; and also the requisite notices of admission and examination, and the documents to be lodged with the Incorporated Law Society. The regulations for conducting the examination, the practice of being admitted into all the courts, with forms of the necessary affidavits; the mode of obtaining the several commissions, and the issuing of the annual certificates follow, together with a list of all the necessary stamps, fees, and charges."

Thus far, then, the reader sees mapped out in detail the matters referred to in the compendious title page. We wish we had space to enter more fully into the plan of Mr. Wharton, but as we presume most articulated clerks will purchase the work for themselves, this is the less to be regretted. We have looked through the volume, and can say that it is as accurate as could be expected, and two or three mistakes we have noticed are quite trivial, such as that the last edition of Harrison's Digest comes down to the year 1843 only, and that there are still inferior Courts of Chancery in the Cinque Ports, whereas our readers know (2 L. C. 148) that they have been abolished. Occasionally the information afforded is of a very general nature, as the following: "There is a great deal of practice relating to the drawing up, passing and entering the decree, enforcing it, and appealing against it."

One feature of utility in the mode of preparing the work is the frequent recourse to the tabular method, which is a great assistance to the reader. One short extract we must give in order that it may be understood what we mean in this respect. We select from that part treating of the practice of the courts.

"III. After acquiring a notion of the province of the common law, the tribunals for its administration should be learned.

"A tribunal or court is a public place set apart for the administration of justice, by properly constituted authorities. Its constituent parts are three—viz.: 1. the *judex* or judge; 2. the *actor*, or plaintiff; and, 3. the *reus*, or defendant.

The common law tribunals, or courts, rank in the following order:—

"(1) The Court of Queen's Bench; which is a court of record, and has five judges—viz.: one Lord Chief Justice, and four *puisne*, or junior justices. Besides the five judges, there are five masters, and a numerous staff of clerks for the transaction of the business of the several offices connected with the courts.

"The jurisdiction of this court is twofold; the civil or plea side, and the criminal or the crown side. The matters comprised within its civil jurisdiction may be thus classed—

"(I.) Formal or plenary.

"(1) Personal actions.

"(2) Mixed action of ejectment.

"(II.) Summary.

"(1) Annuities and mortgages (15 & 16 Vic. c. 76, ss. 219, 220).

"(2) Arbitrations and awards.

"(3) Habeas Corpus Act (31 Car. 2, c. 2, extended by 56 Geo. 3, c. 100).

"(4) Interpleader Act (1 & 2 Will. 4, c. 58).

"(5) Over officers of the court.

"(6) Warrants of attorney, cognovits, and judge's orders for judgment.

"(III.) Auxiliary.

"(1) Answering a special case.

"(2) Enforcing judgments of inferior courts of record.

"(3) Prerogative mandamus to compel inferior courts or officers to act (see 17 & 18 Vic. c. 125, ss. 75—77).

"(4) Prohibition.

"(5) *Quo warranto*.

"(6) Trying an issue in fact from a court of equity, or a feigned issue.

"(IV.) Appellate.

"(1) Appeal from the decisions of justices of the peace, in giving possession of deserted premises to landlords, under 11 Geo. 2, c. 19, ss. 16, and 17.

"(2) Writs of error from certain inferior courts of record (17 & 18 Vic. c. 125, s. 102).

"(3) Writs of false judgment from inferior courts, not of record, but proceeding according to the course of the common law.

"(4) Appeals by way of a case from the summary jurisdiction of justices of the peace, on questions of law (20 & 21 Vic. c. 43; Order of Court, 26th November, 1857).

"(2) Connected with the Court of Queen's Bench, and auxiliary thereto, is the Practice Court, presided over by one of the *puisne* judges in rotation. The Practice Court (formerly called the Bail Court) hears and determines common matters of business, and ordinary motions for writs of *mandamus*, prohibition, &c.

"(3) The Court of Common Pleas, or Common Bench, as it has been sometimes called. This court has a similar staff of judges, masters and officers, as has the Queen's Bench.

"Its jurisdiction is altogether confined to civil matters, having no cognisance in criminal cases, and is concurrent with that of the Queen's Bench, as above classified, except as to the prerogative writs of *mandamus*, *quo warranto*, and error after judgment from inferior courts of record. And it has a peculiar or exclusive jurisdiction in the following cases:—

"(I.) Formal or plenary.

"Real actions.

"(II.) Summary

"Under the Railway and Canal Traffic Act, 1854 (17 & 18 Vic. c. 31).

"(III.) Auxiliary.

"(1) Registration of judgments, annuities, &c. (1 & 2 Vic. c. 110; 2 & 3 Vic. c. 11; 3 & 4 Vic. c. 82, and 18 Vic. c. 15).

"(2) Under 3 & 4 Wm. 4, c. 74, respecting the fees connected with conveyances executed by virtue of the act, and also with the examination of married women concerning their assurances (see 11 & 12 Vic. c. 70; 17 & 18 Vic. c. 75, and 19 & 20 Vic. c. 108, s. 73).

"(IV.) Appellate.

"Appeals from the Revising Barristers' Courts, under 6 & 7 Vic. c. 18.

"(4) The Court of Exchequer of Pleas was originally established to determine those causes in which the Sovereign, or his servants or accountants, was or were concerned; but it has gradually become open to all persons. The number of the judges is the same as in the Queen's Bench, the Lord Chief Baron, and four *puise* barons, with the like privileges and powers, and the officers are similar. There are two sides to this court; the revenue side, where all questions and proceedings concerning the revenue or Crown debts are exclusively determined, and the plea or common law side. The subjects of jurisdiction within the plea side of this court are precisely the same as those of the Queen's Bench, set forth, *ante*, except as to annuities, prerogative writs of *mandamus* and *quo warranto*, and appeals from justices of the peace in giving landlords possession of deserted premises, the statutes relating to such matters only embracing the judges of the Queen's Bench and Common Pleas.

"These, then, are the three superior courts of common law at Westminster, with their concurrent and exclusive civil jurisdictions.

"The number of the judges and barons of each of these courts who sit *in banco*, or in full court, during term time, is four—viz., the Chief Justice or Chief Baron, with three *puise* judges, or barons; the five judges never sit together, or professedly concur in any decision; the remaining *puise* judge or baron in rotation hears and decides upon matters of less importance at chambers, and as to the Queen's Bench, in its Practice Court. All the most important proceedings are transacted before the full court *in banco*, such as formal arguments and decisions upon demurrers, or in arrest of judgments, or upon special cases and verdicts, or upon rules for new trials, &c. At Judges' Chambers, in Chancery-lane, a single judge exercises an extensive jurisdiction over minor proceedings, such as mere courts of practice, irregularities, &c., which arise in the conduct or defence of an action, and this as well in term as during vacation. One of the fifteen judges remains in town during the vacations and assizes to transact the chamber business of all the courts.

"(5) But a most important part of the practice, the trial of issues in fact, is determined in the *nisi prius* courts, which are formed by a single judge and a jury. They are the sittings at *nisi prius* in London

and Westminster; the circuit *nisi prius* courts; trials at bar, which may be had before the four judges at Westminster and a special jury; and trials before the under-sheriff, which have been greatly diminished by the county courts.

"(6) The error and appeal tribunals are the Exchequer Chamber and the Judicial Court of the House of Lords."

On the whole, we think, any articulated clerk commencing his studies will find Mr. Wharton's book of assistance, as it will aid him in ascertaining to what matters he should direct his attention, and at the same time furnish him with information serving for the ground-work of further study. There certainly is no work of the kind, and that is some merit in these days of imitation.

OKK'S MAGISTERIAL SYNOPSIS.

A Practical Guide for Magistrates, their Clerks, Attorneys, and Constables, in all Matters out of Quarter Sessions; containing Summary Convictions and Indictable Offences, with their Penalties, Punishment, Procedure, &c., tabularly arranged. By GEORGE C. OKE, Assistant Clerk to the Lord Mayor of London, Author of "*The Magisterial Formulist*," "*The Law of Turnpike Roads*," &c. &c. Sixth Edition, Enlarged and Improved. London: Butterworths. 1858.

It is so short a time since we noticed the 5th edition of Mr. Oke's work, that when we saw an advertisement of the 6th edition, we thought it must be a mistake, but we now find that it is a reality. We cannot say we are very much surprised at this when we consider the utility of the work to all engaged in magisterial matters—to them it is indispensable—we may say a real treasure. We find the size of the volume increased by about 200 pages, and it is evident that the author has taken the opportunity of revising and improving the work. As he mentions during the last year the additions to, and alterations in, magisterial law have been few but important, amongst the statutes are the 20 & 21 Vic. c. 43, enabling dissatisfied parties to call upon, and justices to state, cases for the opinion of a superior court of common law on questions of law arising on summary proceedings, which Mr. Oke has noticed and given the necessary forms. The 20 & 21 Vic. c. 8, altering the terms of *penal servitude* for indictable offences, has required great alterations extending through nearly 100 pages. Indeed, this act alone would have justified a new addition, as the practitioner and magistrate's clerk (not to say the magistrate) were continually called upon to say what were the alterations made in the sentences for the various offences. It appears, too, that the author has enlarged many of the titles, and added others which were called for—namely, "Evidence before

Magistrates," "Actions," "Mandamus," "Rule," "Certiorari," "Divorce," "Industrial Schools," "Obscene Books," "Reformatory Schools," &c., besides minor improvements. It is impossible for us to set forth these in detail, but an extract may give some idea of the sort of information to be found in the work. Our extract will be taken from that part of the introduction which treats of documentary evidence, which is divided into (1) private documents; (2) public documents; (3) foreign and colonial laws—

"As to private documents.—According to the rule, that the best evidence must be given (No. 3, p. 69), and that secondary evidence is inadmissible until the absence of primary evidence is explained satisfactorily, a party who relies upon a written document must either produce it, or show that he has made every reasonable effort to produce it. In the latter case, if he has been unsuccessful, he may prove the original document, either by a copy, or any other authentic kind of secondary parole evidence. (Powell, 295). The rule is, that all originals must be accounted for, before secondary evidence can be given of any one (Parke, B., *Alison v. Furnival*, 1 C. M. & K. 292).

"Notice to produce, when unnecessary.—It must first be proved, that the original is in the hands of the adverse party, and that a notice to produce has been served on such party a reasonable time before the hearing; but where the document is in the hands of a third party, a subpoena *duces tecum* must be obtained from the crown office, justices having no power to summon a witness and require him to produce documents before them in any case. A notice to produce is, however, unnecessary in these cases—1st, where a party holds a duplicate original or counterpart of his adversary's document; 2nd, when the nature of the case and proceedings inform the adverse party sufficiently, that he will be required to produce the document; 3rd, a notice to produce a notice is not required—*e. g.*, a notice to quit, a notice of action, notice of dishonour of a bill, notice to produce a signed attorney's bill in an action on it; 4th, if a party or his attorney be shown to have an original with him in court, and refuses to produce it, secondary evidence will be received, notwithstanding the want of a notice to produce; 5th, notice will not be required when the adverse party has admitted the loss of the original, or where it is in the nature of an irremovable fixture; and 6th, merchant seamen are permitted to prove orally an agreement with the master of a ship, without producing the original, or giving notice to produce it (17 & 18 Vic. 104, s. 165; Powell, 299—301).

"Stamps.—As to the stamps on written documents, the general rule is, that where a stamp is essential to the legal validity of a writing, that writing cannot be given in evidence in *civil* proceedings if it be unstamped, or insufficiently stamped (Powell, 357); and in these proceedings we must class all these matters before justices which are not termed indictable offences, or charges punishable on summary conviction (a distinction made by the Law of Evi-

dence Act, 14 & 15 Vic. c. 99, s. 3, *ante*, p. 57); but in the superior courts, the 17 & 18 Vic. c. 125, ss. 28, 29, allows the officer to affix a proper stamp on payment of a penalty. In *criminal* proceedings (and which are those relating to indictable offences and summary convictions), the rule is different, for the 17 & 18 Vic. c. 83, s. 27, enacts, that 'every instrument liable to stamp duty shall be admitted in evidence in any *criminal* proceeding, although it may not have the stamp required by law impressed thereon, or affixed thereto.' When it is necessary to produce the writing, or account for its absence, secondary evidence will not be received, if it appear that the original required a stamp, and that it was unstamped. But a writing requiring a stamp will be presumed to have been properly stamped; and so as against a party refusing to produce it after notice. Such a presumption may be rebutted by evidence, that the writing was not stamped. Where an instrument is inadmissible by reason of the stamp laws, it will be allowable to resort to other admissible evidence (Powell, 361; Davis's County Courts, 2nd ed. 79, 72).

"Proof of handwriting.—The proof of signatures or handwriting is the essential part of the proof of private writings. There are various admissible kinds of such proof—1, handwriting may be proved by a witness who actually saw the party write or sign, which is the most satisfactory evidence; 2, by a witness who has seen the party write on other occasions, even if it be but once only; 3, by a witness who has seen documents purporting to be written by the same party, and which by subsequent communications with such party, he has reason to believe the authentic writings of such party; 4, under the Common Law Procedure Act, 1854, (17 & 18 Vic. c. 125, s. 27), in *civil* cases, a witness may give his opinion as to the authenticity of a disputed document, by comparing the handwriting with any document which has been proved to the satisfaction of the judge to be the genuine writing of the party (Powell, 304).

"Proof by attesting witness.—Should there be an attesting witness to the writing, he must be called; but by the 17 & 18 Vic. c. 125, s. 26, in *civil* cases, it is not now 'necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission, or otherwise, as if there had been no attesting witness thereto.' To this reservation there are several common law exceptions. Thus, it is a rule that—

- "An attesting witness need not be called to prove an instrument which is more than thirty years old;
- or when the original is withheld by an adverse party, who refuses to produce it after notice;
- or when the adverse party, in producing it, after notice, claims an interest under it;
- or when the adverse party has recognised the authenticity of the instrument by acts in the nature of an estoppel in a judicial proceeding;
- or when the attesting witness is proved to be

dead, insane, beyond the jurisdiction of the court, or otherwise not producible after due endeavours to bring him before the court.

"It will be sufficient generally to prove in these cases the handwriting of the attesting witness (Powell, 307).

"*Writings that refresh the memory.*—Documents will often be admissible to refresh the memory of a witness, and the witness may give oral evidence accordingly, after a perusal of their contents:—

- 1st. When the writing actually revives in his mind a recollection of the facts to which it refers;
- 2nd. When, although it fail to revive such a recollection, it creates a knowledge or belief in the witness that, at the time when the writing was made, he knew or believed it to contain an accurate statement of such facts;
- 3rd. When, although the writing revives neither a recollection of the facts, nor of a former conviction of its accuracy, the witness is satisfied that the writing would not have been made unless the facts which it purports to describe had occurred accordingly (Powell, 309).

"*Matters required to be proved by writing only.*—Many matters can be proved only by deed or other writing; and in such cases, oral evidence, however distinct and direct, is wholly inadmissible (Powell, 313), viz.—

"Incorporeal rights, such as advowsons, reversions, &c.

Contracts by corporations, by deed bearing the corporate seal.

Contracts by joint stock companies under special acts (8 & 9 Vic. c. 16, s. 27; 7 & 8 Vic. c. 110, ss. 44, 45, 46; 19 & 20 Vic. c. 47, s. 41).

Transference of shares in joint stock companies (8 & 9 Vic. c. 16, s. 14; 19 & 20 Vic. c. 47, ss. 20, 21, 26, 112).

Sale of ships (17 & 18 Vic. c. 104, s. 55).

Leases or interests in land (29 Car. 2, c. 3, ss. 1, 2, 3; 8 & 9 Vic. c. 106, s. 3).

Wills (29 Car. 2, c. 3, s. 5; 7 Will. 4, and 1 Vic. c. 26; 15 & 16 Vic. c. 24).

"*Extrinsic evidence to explain.*—The following are established rules as to the admission of oral evidence to vary or explain written documents:—

- 1st. Extrinsic evidence is inadmissible to contradict, add to, or subtract from or vary, the terms of a written instrument.
- 2nd. Extrinsic oral evidence is admissible to prove that another contract not under seal has been discharged, either before or after breach.
- 3rd. A written instrument cannot be released or avoided by evidence of an intrinsically inferior nature.
- 4th. Extrinsic evidence is admissible to explain written evidence (Powell, 331—356)."

The mass of information contained in this work in a tabular form is unprecedented, and we could wish

that Mr. Oke had extended his labours to other portions of the law, as we are satisfied that his industry, learning, and excellence of arrangement, would prove advantageous in other spheres. However, we must be content to have what Mr. Oke gives us, and it must be added that so useful a volume could not possibly have been produced merely as a result of literary labour (unless by a German), for its excellence is, in a great measure, due to the practical experience which the author daily has in the position which he now occupies, as well as what he formerly had. It is this peculiar feature which has given to the work that reputation which it has so worthily obtained, and has made the profession a debtor to Mr. Oke.

SUMMARY OF DECISIONS.

EQUITY AND CONVEYANCING.

COPYHOLD.—*Unlawful seizure*—*Jurisdiction of courts of equity.*—In Com. Dig. Tit. "Copyhold," p. 2, it is said, "If the lord ousts his tenant without cause, or for an involuntary forfeiture, the copyholder may sue in Chancery, and shall be there relieved." This authority has been followed by V. C. Wood, who has decided that a copyholder, who has been ousted without cause by the lord, is entitled to relief by suit in equity, as well as by action of trespass at law. *Andrew v. Hulse*, 6 Week. Rep. 508.

HUSBAND AND WIFE.—*Domicil*—*Foreign will*—*Execution of power.*—Persons residing in foreign countries, where the laws differ from ours, seem to be peculiarly unfortunate in their endeavours to execute wills which shall be valid in this country. In the following case, under a power to appoint by writing under hand, or by will, a married woman, who for thirty years had resided in Paris apart from her husband, a domiciled Englishman, disposed of the fund by testamentary papers, signed, and good by the law of France, but not attested. It was held, that this was not a valid execution (re Daly, 6 Week. Rep. 533). The Master of the Rolls said, that *Bainbridge v. Smith* (8 Sim. 86) was exactly in point. He added, "the law requires two witnesses to a will, and as the testatrix has attempted to exercise the power by will, the documents cannot be a good execution under the other alternative of writings under her hand. Then it is said, these papers constitute a good will by French law, and there is no doubt that if the case were governed by French law, they would be a good execution of the power. But this depends on whether she, being a wife, could by residence in Paris acquire a French domicil distinct from her husband, whose domicil was English. I

think the authorities decide the contrary. The cases in the House of Lords (*Warrender v. Warrender*, 2 Cl. & Fin. 488; *Tovey v. Lindsay*, 1 Dow. 124) are conclusive." *Re Daly*, 6 Week. Rep. 583.

LEGACY.—*Contingency—Vesting—Divesting.*—A legacy given absolutely will not be divested if the event on which it is given over does not strictly happen. After the ceasing of a life estate, "a gift to three persons equally, or, in case of the death of each or either of them, to be divided between the survivors or survivor, or their representatives." Held, on the death of the three before the tenant for life, that their legal personal representative was entitled to the fund. The case of *Macdonald v. Bruce* (16 Beav. 581; 22 L. J. Ch. 779), is a doubtful one. *Page v. May*, 27 L. J. Ch. 242.

MAINTENANCE.—*Will—Construction—Bequest of income to trustees for lunatic possessed of absolute property—Which fund primarily liable for maintenance?*—A lady was absolutely entitled to property of which her brother was a trustee. She became of unsound mind, but was not found so by inquisition. The brother by his will bequeathed property to trustees upon trusts for investment, and directed them to pay half the income of the residue to the lady's husband for his life; and after his decease to pay such half of the income to the lady for her life, or to apply the same, or so much thereof as might be necessary for her support and maintenance; and if there should be any surplus, the same was to be accumulated and paid as in his will mentioned. After the death of the testator the lady was found lunatic by inquisition. The Master in Lunacy reported on the property and income of the lunatic, and the court ordered a sum to be paid for her maintenance greater in amount than her life income under the will, and greater also in amount than the interest of her absolute property. A bill was filed, by the committee of the lunatic's estate, to have it determined which was the primary fund for her maintenance: Held, that the life income given by the testator must be first applied, and the remainder only of the maintenance must be made up out of the income of the property to which she was absolutely entitled. *Rutland v. Crozier*, 27 L. J. Ch. 261.

MORTMAIN.—*Charity—Public library.*—The so-called Statute of Mortmain is a restraining statute, and it is said to be the duty of the courts, wherever a doubt exists, to give their decision against it. Unless a gift be to a charitable use it is not void under the statute, which is expressly directed against the gift of land "for the benefit of any charitable use whatever." An institution, called the Penzance Public Library, supported by voluntary subscription of its members, and having for its object the collect-

ing and preserving books for the use of such members, held, not to be a charity within the provisions of the Statute of Mortmain. A devise of freeholds to the trustees for the time being of such library, and their successors for ever, for the use, maintenance, and support of the same library, held valid accordingly. *Carne v. Long*, 6 Week. Rep. 582.

PUBLIC COMPANY.—*Joint stock company—Winding-up acts—Insurance companies—Official manager of one company struck off the list of contributories to another.*—A policy of insurance is a contract. Where, therefore, the secretary of the A. insurance company effected policies in another (the S. M.) insurance company, and the policies were expressed to be granted to him "as the secretary and manager for and on behalf of the A. society, and his successors in office," the two companies were being wound-up, and the chief clerk placed the name of the official manager of the A. company on the list of contributories to the S. M. company: Held, that his name must be struck off the list, as the policies were originally granted to the secretary of the A. company, and he therefore, and not the A. company, was the party liable on the contract. *Exp. Harding, the Official Manager of the Athenæum Life Insurance Society*, 31 Law Tim. Rep. 94.

SETTLEMENT.—*Power of sale—Time—Postponement in order to avoid sale at disadvantage—Infant.*—An infant cestui que trust, aged ten years, who was entitled upon marrying or attaining twenty-one to the proceeds of certain real estate which was directed to be sold so soon as conveniently might be after the death of a tenant for life, filed her bill upon the death of such tenant for life, praying that the trustees might be at liberty to postpone the sale, upon the ground that the property was likely to increase materially in value: Ordered, that the sale should be postponed until the further order of the court. *Morris v. Morris*, 6 Week. Rep. 493.

SHIPPING.—*Merchant Shipping Act, 1854* [vol. 1, p. 346; vol. 3, p. 316]—*Jurisdiction—Foreign owner.*—British acts of Parliament are *prima facie* applicable to British subjects only, when legislating in respect of matters not arising within the British dominions. As observed by Dr. Lushington in the *Zollverein* (2 Jur. N. S. 429), "In looking to an act of Parliament with reference to such a question as I am now discussing—viz., as to whether it is intended to apply to foreigners or not, I should, endeavouring to ascertain the construction of the act, always bear in mind the power of the British Legislature; for it is never to be presumed, unless the words are so clear that there can by no possibility be a mistake, that the British Legislature exceeded that power which, according to the law of the whole world,

properly belonged to it. The power of this country is to legislate for its own subjects all over the world, and as to foreigners within its jurisdiction, but not further; that being so, I should be ill disposed to think that any attempt has been made to exceed that power, unless the words of the statute prevented my coming to a contrary conclusion." It has been decided that English courts have no jurisdiction to entertain a suit instituted by a foreign shipowner, under part 9 of the Merchant Shipping Act, 1854 (vol. 3, p. 316), for the purpose of limiting his liability in respect of a collision—the act being applicable to British ships only, except where foreign ships are expressly mentioned. *Cope v. Doherty*, 6 Week. Rep. 537.

TENANT FOR LIFE.—*Farm buildings—Repairs.*—An agreement for letting a farm having been sanctioned by the court, the tenant for life was allowed the expense of permanent repairs done to the house and buildings out of a sum of stock settled upon the same trusts. *Macnolly v. Fitzherbert*, 27 L. J. Ch. 272.

TRUSTEES.—*Out of country—Trustee Act, 1850—Copyhold—Covenant to surrender.*—In some cases, where a trust is constituted by a covenant in a deed to do an act, the courts decline to make orders under the Trustee Acts until a decree for specific performance of the covenant in question has been made. In the following case there was a covenant by A. to surrender copyholds to the use of B., and in the meantime, and until such surrender should be made, that A. would stand seised of the copyholds "upon trust for and to surrender the same unto B." A. went out of the jurisdiction without making any surrender. An order was made under the Trustee Act, 1850, for the appointment of a person to surrender the copyholds to B., without requiring a decree for specific performance to be obtained. *Re Collingwood*, 6 Week. Rep. 536.

TRUSTEES.—*Lands and surviving trustee in Ireland—Cestuis que trust in England—Trustee Act of 1850—Jurisdiction.*—The 54th section of the Trustee Act, 1850 (the 13 & 14 Vic. c. 60), extends to all lands and personal estate within the dominions, plantations, and colonies belonging to her Majesty, except Scotland. The 55th extends the jurisdiction in such matters to the Court of Chancery in Ireland, with respect to all lands in Ireland, and the 56th applies to all English colonial possessions, excepting Scotland and Ireland. In the case of *Re Davies* (3 Mac. & Gor. 278), it was held, that in lunacy, under the 56th section, the Lord Chancellor had no jurisdiction as to Ireland. *V. C. Kindersley* has decided that where land held in trust is situated in Ireland, the cestuis que trust in England, and a surviving trustee in Ireland, the English courts have

jurisdiction concurrently with the Irish courts under the 54th section of the Trustee Act of 1850 (13 & 14 Vic. c. 60), to appoint new trustees and make a vesting order, except in cases of lunacy. *Re Hewitt*, 6 Week. Rep. 537.

WASTE.—*Jurisdiction—Receiver pending litigation—Demurrer—Plea.*—It is a well-settled rule, that the court will not interfere to appoint a receiver at the instance of a person alleging a mere legal title in himself against other persons who are in possession of the estate. Whether the court will in such a case interfere to prevent destructive waste—*quere*. The case of *Courthope v. Mapplesden*, 10 Ves. 290, in which the court granted an injunction against a trespasser cutting timber by collusion with the tenant, is the strongest case in which it has interfered to restrain waste: there is no case in which it has interfered to restrain the acts of a mere trespasser; but if the acts complained of are such flagrant acts of malicious waste as to indicate fraud—*semble*, that would be a case for interference. To a bill stating that by a private act of Parliament certain real estates were settled inalienably upon the earldom of S., and that proceedings were pending in the House of Lords to establish the plaintiff's claim to the earldom, and that the defendants were in possession under an alleged title derived from a former earl, and praying that, pending those proceedings before the House of Lords, a receiver might be appointed, and the defendants restrained from committing waste, the defendants demurred: Demurrer allowed, there being no allegation that any proceedings were pending for the recovery of the estates. The bill charged that many of the tenants of divers parts of the settled estates had, by reason of the conflicting claims, refused to pay their rents to either the plaintiff or the defendants, and by reason thereof such rents were in danger of being lost: Held, that this was not sufficient to support a prayer for a receiver, there being no allegation that proceedings had been taken against the tenants. The bill also stated that the defendants were trustees of other parts of the estates for the benefit of such person as should be earl of S., and that the claim of the earldom was in litigation, and prayer for a receiver. Plea, that the plaintiff was not earl of S.: Held, good. Plea not overruled by a voluntary answer in support. *Earl Talbot v. Hopscott*, 27 L. J. Ch. 273.

WILL.—*Void gift—Remoteness—Perpetuity.*—A well-known rule of law prescribes that all gifts by will are void which do not necessarily vest within a life or lives in being, and a period of twenty-one years afterwards. In the case of a gift so framed that its vesting might, by any possibility, be postponed to a more distant period, the whole gift fails.

Accordingly, where a testator directed his trustees to accumulate his residuary personal estate until the same should amount to £3000 or thereabouts, and then to apply the same in the manner, and for the benefit of the persons in his will mentioned: Held, that since the sum of £3000 might not come into existence within the extreme period allowed by law, the gift was too remote, and failed accordingly. *Oddie v. Browne*, 6 Week. Rep. 531.

WILL.—*Construction*—*Repugnant gift over after absolute gift.*—In construing wills, the general rule as to personal estate is that where an absolute interest is bequeathed, and a gift over is superadded in the event of the legatee dying without having disposed of the legacy, such gift over is void. In the following case it was contended that there is not the same ground for such a rule where, as in that case, the legacy consists of leaseholds. That a reason in support of the expediency of the rule with regard to personalty, is that in many cases it might be very difficult, and even impossible, to ascertain whether any part of the fund remained undisposed of or not, since, if the legatee of the absolute interest left any personalty, it might be wholly uncertain whether it were a part of the precise fund which was the subject of the condition or not. And further, that such a reason is not applicable where the subject-matter of the bequest, being leasehold property, may always be identified. The court, however, did not adopt this distinction. It appeared that the testator, by his will, bequeathed unto his wife all his leasehold property, wheresoever situate, for her sole use and benefit, except a certain house therein described; and in a subsequent part of his will he directed, that as soon after the decease of his wife as might be practicable, all his leasehold property not already disposed of by her (save and except the before-mentioned house) should be sold, and the produce thereof distributed by his executors (of whom the wife was named one) amongst certain persons, in the proportions therein stated: Held, that, upon the death of the testator, his widow became absolutely entitled under his will to the leasehold property bequeathed to her by such will, and that the direction to sell contained in such will, and the expressed disposition of the proceeds of sale, were repugnant to the preceding absolute gift to the testator's wife, and void. *Bowes v. Goslett*, 27 L. J. C. M. 249.

EQUITY PRACTICE.

PRODUCTION OF DOCUMENTS.—*Protection*—*Party's title deeds not showing opponents title.*—An affidavit that documents (admitted to be relevant) relate to, or show (instead of "and show") or tend to show the title of plaintiffs exclusively, is not

sufficient to enable the plaintiff to protection. Parties are answerable for the correctness of their affidavits as delivered to the other side. *Lloyd v. Purvis*, 6 Week. Rep. 507.

SUBSTITUTED SERVICE.—*Judgment creditor*—*Attorney on record.*—By the 15 & 16 Vic. c. 86, s. 5, the court is at liberty to direct substituted service of a bill or claim in such manner and in such cases as it shall think fit. To a vendor's bill to enforce a lien upon the purchased estates in respect of unpaid purchase money, by means of a sale of those estates, certain judgment creditors of the insolvent purchasers were made parties in respect of their interests in those estates as such creditors. Two of the judgment creditors being out of the jurisdiction, substituted service of a printed copy of the bill upon their respective attorneys in the actions in which the judgments had been recovered, was ordered to be good service on them respectively, such attorneys, being still the attorneys named on the records of the judgments, but declining respectively, for want of instructions, to accept service of the bill for their respective clients. *The Governors of the Grey-coat Hospital v. Westminster Improvement Commissioners*, 27 L. J. C. M. 250.

TRAVERSING NOTE.—*Service under 56th Order of May, 1845.*—By 56th Order of May, 1845, after a traversing note has been filed, a copy must be served upon the defendant. The court will grant an order for service of a traversing note under the 56th Order of May, 1845, without proof that the defendant is within the jurisdiction. *Hunt v. Noblete*, 30 Law Tim. Rep. 331.

COMMON LAW.

CARRIERS.—*At common law*—*Carriers Act*—*Replication of felony by defendants' servants.*—In the *Great West. Rail. Co. v. Rimmel* (18 C. B. 575), C. J. Jervis, said: "Where the defendants being carriers set up a defence under the Carriers Act, 1 Will. 4, c. 68, negligence has nothing to do with the question. The rule is this: under the statute felony by a servant is a sufficient answer to the defence set up by the carrier, and negligence has nothing to do with it; and on the other hand, under the carrier's notice, negligence is the sole question—felony is immaterial." In the following case, the declaration was at common law against the defendants as common carriers, for the loss of goods. Plea: Under the Carriers Act, s. 1. Replication: That the loss was occasioned by the felonious act of the servant of the defendants: Held, that the replication was good. *Metcalfe v. The London and Brighton and South Coast Railway Company*, 6 Week. Rep. 498.

COMPOSITION DEED BY CREDITORS.—

Covenant not to sue—Release containing saving clause against others.—The following decision and a similar one in *Willes v. De Castro* (6 Week. Rep. 500), as to the construction to be put on a release containing clauses saving rights against other persons are of very great practical importance, it being held that a composition deed signed by the creditor of the insolvent is to be treated as a covenant not to sue, and not as a release, when such is evidently the intention of the parties; also that a release in terms cannot be treated as a release, if it be followed by a saving clause against certain parties. *Currey v. Armitage*, 6 Week. Rep. 516.

CONTRACT.—Custom—Question for the jury—Wrongful dismissal of servant.—Where an action was brought for a wrongful dismissal of a servant, the service being under a written agreement at a yearly salary, and a custom to terminate the agreement at a month's notice was pleaded, the jury found that the custom existed, but did not apply to the special terms of the contract: Held, that it was for the court to look at the contract, and to see if the custom as found was excluded by it. A stipulation for a donation to the servant at the end of the year, under certain circumstances contained in a written agreement for a yearly hiring, does not exclude either party from setting up a custom on termination of the agreement at a month's notice. *Parker v. Ibbetson*, 6 Week. Rep. 519.

FALSE IMPRISONMENT.—Pleading—Mitigation of damages—Evidence admissible under general issue.—In *Sedgwick on Damages*, it is said that the general rule is that "anything which is a complete answer to the action must be pleaded either in bar or in justification; but it is well established in many cases that matters which go to the quantum of damages merely, to palliate the character of the offence, or to mitigate the amount which the jury may award, may be given in evidence under the general issue." It has accordingly been decided that in an action for false imprisonment, evidence is admissible in mitigation of damages under the general issue, showing that the plaintiff had committed a misdemeanor, provided it does not afford a justification of the trespass alleged. *Linford v. Lake*, 6 Week. Rep. 515.

HUSBAND AND WIFE.—Debt of wife before marriage—Bankruptcy of husband.—In *Lockwood v. Salter* (5 B. & Ad., 309), to a declaration against husband and wife for a debt due from the wife, the husband's discharge under the Insolvent Act was held to be a good plea. This decision was acted on in the following case, it being held that to a declaration against husband and wife, for a debt due from the wife before coverture, the husband's bankruptcy is a good plea, there being no allegation that the

wife is possessed of separate property. *Carr v. Duncan and wife*, 31 Law Tim. Rep. 96.

METROPOLITAN BUILDING ACT.—Meaning of words "owner"—Liability for surveyor's fees.—The interpretation clause, s. 3 of 18 & 19 Vic. c. 122 (the Metropolitan Building Act, 1855), provides that the word owner shall apply to every person, in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement, other than as a tenant from year to year, or for any less term, or as a tenant at will." By s. 51, the district surveyor is entitled to receive the fees due to him in respect of any building, "from the builder employed in erecting such building, or from the owner or occupier of the building so erected." The reversioner of land let on a building lease for eighty-one years, in respect of which a peppercorn rent only is payable at the time of the accrual of fees to the district surveyors, is not an "owner" within the Metropolitan Building Act, 1855, so as to be liable for the surveyor's fees. *Evelyn v. Whichcord*, 31 Law Tim. Rep. 96.

PUBLIC COMPANY.—Joint Stock Companies Act, 1856 (19 & 20 Vic. c. 47, s. 43)—Promissory note made by directors of a joint stock company—Liability of company—Personal liability of directors.—By sec. 43 of the 19 & 20 Vic. c. 47, it is provided that a promissory note or bill of exchange shall be deemed to have been made and accepted or indorsed on behalf of any company registered under that act, if made, accepted, or indorsed in the name of the company, by any person acting under the express or implied authority of the company. A promissory note in the following terms:—"London, Dec. 31, 1856. Three months after date we promise to pay Mr. F. S. or order £600 for value received in stock on account of the L. and B. Co., limited." Signed by three directors of a company incorporated under the 19 & 20 Vic. c. 47, and countersigned by the secretary of the same company: Held, to be a note binding on the company, and not personally on the directors who signed it. *Crompton and Willes, J. J., dubitantibus. Lindus v. Melrose*, 6 Week. Rep. 441.

PUBLIC COMPANY.—Mining company—Winding up—Registered under Limited Liability Act—Action by shareholder for money paid on shares.—The following case depends in some degree on the form of pleading, but still it is important with reference to the right of a shareholder to sue the directors of a company for the money which he has paid on certain shares which he took in consequence of the fraudulent representations of such directors. A mining company was established in 1853 on the cost-book principle, in which plaintiff took shares,

and dividends were from time to time declared in the form of additional shares instead of money, and plaintiff accepted such additional shares. Afterwards, the company was registered under the Limited Liability Act, and, subsequently, in 1857, an order for winding up the company was obtained, under which the plaintiff was made a contributory. The plaintiff then sued three of the directors for money had and received, to recover the price paid for his shares, on the ground that he was induced to become a shareholder by fraud of the directors: Held, that his proper remedy was by special action on the case against the parties who had defrauded him, and not money had and received. *Clarke v. Dickson*, 31 Law Tim. Rep. 97.

PUBLIC COMPANY.—*Liability for calls—Application for shares in joint-stock company—Registration shareholder*—19 & 20 Vic. c. 47.—The 19 & 20 Vic. c. 47 (the Joint-Stock Companies Act, 1856), provides, that two documents shall be prepared, the memorandum of association, and the articles of association: the forms of these documents are given in the schedule to the act. By the act every subscriber is to take shares. Then the 11th section says, "any person signing a printed copy of the memorandum of association shall be deemed to have signed such memorandum and articles:" that is a distinct provision. According to the act, all people have to do to form a company is to provide a memorandum of association, and send copies round to the parties applying for shares, and by the 11th section any person signing a copy of that memorandum and articles, professes to be willing to be a shareholder. Then the 3rd section provides for the registration; and to do that seven persons must subscribe their names to the memorandum, and that is necessary to get the company registered; but there is nothing which says that the names of the seven persons signing must be communicated. In the following case, it appeared that the defendant paid deposit on certain shares in the plaintiffs' company on 19th of July, 1856, and applied for shares; on the 29th he received a letter of allotment; on the 14th Aug. he received printed copy of memorandum of association and articles, and consented to become a shareholder, which he signed and returned to the secretary on the 16th. Scrip certificates were then sent to the defendant. The memorandum and articles were afterwards dated 22nd Sept., and on the 25th of that month they were delivered to the registrar, and a certificate of incorporation obtained: Held, that the company was duly incorporated, and that the defendant was a shareholder in it, and was, therefore, liable in an action for calls. *The New Brunswick and Canada Railway and Land Company v. Boone*, 31 Law Tim. Rep. 103.

SHIPPING.—*Freight—Damage in transitu.*—In the following case it was contended that, upon a contract to carry goods from one part to another at a fixed rate, the sender might resist payment of freight by showing that through the fault or neglect of the shipowner or his agents, the goods sustained injury and arrived in a state unfit for use; but V. C. Stuart denied that there was any such doctrine, and decided that the shipper of goods cannot resist a demand for freight, upon the ground that such goods were damaged *in transitu*, even in a case where the effect of such damage may have been to render them totally unfit for use. His remedy lies in an action for negligence against the shipowner. *Garrett v. Melhuish*, 6 Week. Rep. 491.

STATUTE OF FRAUDS [3 L. C. 96, 98; Princ. Com. L. p. 149].—*Guarantee before 19 & 20 Vic. c. 97—Consideration.*—The defendant, before the Mercantile Law Amendment Act, 1856 (3 L. C. 96, 98), sent the following letter to the plaintiffs:—"Gentlemen, I beg to inform you that I am ready to assist my son with what funds are necessary to enable him to carry on his business respectably; and I also engage to hold myself responsible for any debts he may contract in the establishment connected with the same. I am, &c., T. G. To the committee managing the affairs of Lloyd's:" Held, that it did not sufficiently appear that the consideration for the defendant's promise was the admission of his son into Lloyd's as a broker; and that, therefore, under sect. 4 of the Statute of Frauds, the promise could not be enforced. *Baring v. Grieve*, 31 Law Tim. Rep. 96.

TRADE MARK.—*Infringement of, fraud—Knowledge of defendant.*—If a trade mark is imitated for a lawful purpose, no action lies; *aliter*, if for an improper purpose. Where a person prints and sells labels bearing the peculiar registered trade mark of another firm: Held, that such person is liable in an action at the suit of the owner of the mark, if he prints and sells such labels, knowing that they to be used for the fraudulent purpose of being applied to spurious imitations of the plaintiff's goods. *Farina v. Silverlock*, 6 Week. Rep. 501.

COMMON LAW PRACTICE.

AMENDMENT.—*Errors in drawing up judge's order.*—If an error be made in drawing up a judge's order, the court will amend it, if necessary. *Rawdon v. Reynoldson*, 6 Week. Rep. 522.

APPEAL FROM CHAMBERS.—*Time for appeal from judge's order.*—If an application be made at chambers in August and refused, and a similar application be made in November and again refused, there cannot be an appeal in the ensuing Hilary Term, the period for appeal being reckoned from

the decision in August. *Clark v. Smith*, 6 Week. Rep. 522.

ARBITRATION.—*Compulsory order of reference*—*Power of court to set aside award, or to remit case to arbitrator.*—The court has no more power to set aside an award, or to remit a case back to the arbitrator, where the reference is compulsory under the C. L. P. A., 1854, than where reference is by consent. *Hogg v. Burgess*, 6 Week. Rep. 504.

BOND.—*Penalty*—*Actions for interest*—*Staying proceedings.*—Bonds conditioned for payment of a principal sum six months after notice, with interest in the meantime; an action having been brought for the interest on default of payment, the court refused to stay proceedings on payment of the amount of interest due, and costs. *Wheelhouse v. Ladbroke*, 6 Week. Rep. 104.

CONSOLIDATION.—*Of actions brought by an attorney on separate bills.*—The following is a decision of some interest to solicitors respecting their right to deliver separate bills of costs, it having been contended that an attorney has a right to deliver bills when the business done by him is of a different kind, and that this right is strengthened by the doubtful state of the law as to whether one bad item in an attorney's bill vitiates all the items, as to which see *Princ. Com. L. p. 80*. It was held that where an attorney did different kinds of professional works of a client, and after all the business was transacted sent in a bill for one part of the business, and subsequently sent in a bill for the other part, and commenced an action for the first part of the business before the expiration of the month in respect of the delivery of the second bill, and after the expiration commenced an action for the other part, the court (*assensiente Erle J.*), consolidated the two actions. *Beardsall v. Cheetham*, 6 Week. Rep. 504.

EJECTMENT.—*Staying proceedings till costs of former ejectment paid*—*Identity of title.*—By the C. L. P. A., 1854 (17 & 18 Vic. c. 125, s. 93), it is provided, that "if any person shall bring an action of ejectment after a prior action of ejectment has been or shall have been unsuccessfully brought by such person, or by any person through or under whom he claims against the same defendant, or against any person through or under whom he defends," proceedings may be stayed until security for costs has been given. In the following case, the court stayed proceedings in an action of ejectment, till the costs of a former action, which had been brought by the son of a plaintiff, were paid, it appearing that at the trial of the former ejectment evidence had been adduced to show that the plaintiff in the second ejectment had not been heard of for a long period, in order to raise a presumption of his death, when in truth he was in the neighbourhood,

and knew of the action; and the father, the plaintiff in the second ejectment, claimed title by descent from the same ancestor upon which the son's claim was founded. *Morgan v. Nicholl*, 6 Week. Rep. 542.

EXECUTION.—*Ca. sa.*—*Arrest against good faith*—*Less than £20 of debt remaining due.*—By 7 & 8 Vic. c. 96, s. 57, no *ca. sa.* is to be issued where the debt does not exceed £20 (3 L. C. 403). The plaintiff's attorney on payment of £5 on account of debt and costs, added to the receipt "no further proceedings to be taken." Judgment was afterwards signed, and the defendant arrested. On satisfactory proof that it was not intended to discharge the action absolute, but only on payment of £5 a month, and default having been made in subsequent instalments: Held, that the arrest was valid, and not to be considered as against good faith. If the defendant pays money generally on account of debt and costs, the plaintiff may apply it, in the first place, to the costs, although judgment is not signed, and may issue a *ca. sa.*, though, if the money had been applied to the debt, it would have reduced it under £20. *Weston v. Kenworthy*, 6 Week. Rep. 543.

GARNISHMENT.—*Common Law Procedure Act, 1854*—*Garnishee being a trustee*—*Order not enforceable discharged.*—If, upon showing cause against a garnishee order, it appears to the judge that payment cannot be enforced as by reason of the garnishee being a trustee and the plaintiff, who makes the application, will not take a writ, the judge may discharge the order altogether. *Ninulle v. Williams*, 6 Week. Rep. 501.

VENUE.—*Change of*—*Common affidavit*—*Application by defendant while under terms to take short notice of trial*—*Discretion of judge.*—In the case of *Cludee v. Bradley* (13 C. B. 604; 2 W. R. 79), it was held, that where a defendant is under terms to take short notice of trial, he cannot move to change the venue upon the common affidavit. However, the Court of Exchequer has refused to rescind the order of a judge for a change of venue, made on the application of the defendant, while he was under terms to take short notice of trial, on an affidavit merely stating, in addition to the usual allegation that the cause of action arose in the county to which it was proposed to change the venue, that the witnesses resided there, and that the change would effect a saving of expense. *Cartwright v. Frost*, 6 Week. Rep. 542.

DIVORCE AND PROBATE.

ADMINISTRATION.—*With will annexed*—*Specific legatee*—*Citing next of kin.*—An application for grant of administration with will annexed to the sole legatee, on affidavit, that testatrix died possessed

of no other property than that specifically described in the will: Held, that no reason was shown for not citing next of kin, that they must be cited, or that administration might be taken, limited to the property specified in the will. *Re Watson*, 31 Law Tim. Rep. 104.

DISSOLUTION OF MARRIAGE.—*Petition for, at suit of wife—Averment of desertion—Evidence not to be pleaded.*—A petition for dissolution by reason of the husband's adultery and desertion, directed to be amended by a distinct averment of the fact of desertion, some statement of circumstances in such a petition may be necessary, but evidence should not be pleaded. *Pyne v. Pyne*, 6 Week. Rep. 507.

DISSOLUTION OF MARRIAGE.—*Amended petition—Notice.*—Notice of application for leave to amend should be given to the other party, or the petition may be withdrawn and served *de novo*. *Wright v. Wright*, 6 Week. Rep. 507.

PROOF OF WILL.—*Holograph—Onus probandi.*—When a person produces a will depriving the next of kin of that to which they would otherwise be entitled, and it is disputed, the burthen of proving the will lies on the party propounding it. And it has been ordered in the House of Lords that the mere fact of proving a testamentary instrument to be a holograph, does not shift the onus of proving the handwriting of the testator from the party propounding the instrument. *Anderson v. Anderson*, 6 Week. Rep. 526.

BANKRUPTCY.

ACT OF BANKRUPTCY.—*Absenting—Neglecting to keep appointment with creditor.*—By sec. 67 of the Consolidation Act, it is an act of bankruptcy if a trader, with intent to defeat or delay his creditors, shall (*inter alia*) depart from his dwelling-house, or otherwise absent himself or begin to keep his house. A trader in confessably insolvent circumstances, and with three executions in his house, who neglects to keep an appointment made at half-past nine, a.m., with the solicitor of a creditor for the purpose of signing a declaration of insolvency, on stating which he refused to do so, on the plea that his so attending would be likely to bring premature labour on the wife, then near her confinement, but who, nevertheless, attends at the Court of Bankruptcy at eleven o'clock, only an hour and a-half afterwards, on a trader-debtor summons, thereby commits an act of bankruptcy. *Exp. Chrees*, 31 Law Tim. Rep. 107.

EQUITABLE MORTGAGE.—*Machinery—Fixtures.*—Considerable difficulty exists in the cases of securities given by debtors who afterwards become bankrupt in respect of the relative rights of such

creditors, and the assignees of the debtors. The following raises a question as to the meaning of machinery in an equitable deposit of deeds accompanied by a memorandum. Machinery was spoken of in the memorandum, and the word fixtures was nowhere made use of, and being so called, it was decided that it could not be fixtures in any sense. It was said to come directly within the case of *Re Bevan* (30 L. T. R. 327), before Holroyd, C., who said it was treated as moveable chattels, and that such machinery as he was there speaking of—a printing press—would not be valued as a fixture any more than a looking-glass, adding:—"This is an instrument perfect in itself, and only requires to be steady in order to be useful, and it is immaterial how it is fixed for the purpose." These words show that the commissioner considered the machinery to be simply goods and chattels, and therefore not to come within the case of *Exparte Tagart* (3 De Gex, 581). There is this also, which is very important, that at the time the deposit was made in the case of *Exparte Tagart*, "there were in and upon the premises, valuable freehold, and trade fixtures attached and belonging thereto; all which said fixtures were the property of the bankrupt, and that it was intended and agreed that the same should be comprised in and be, and the same were, subject to the said equitable mortgage of deposit;" and they were called, and sworn to, as *fixtures*. This case differs from the following, because in this latter case the machinery was not called fixtures, but simply machinery, very much as it was called in *Re Bevan*. It appeared that A. deposited by way of mortgage to secure advances, title-deeds, consisting of the original lease, a mortgage deed of the lease, and certain machinery erected on the premises, and a deed of re-assignment to A. on the mortgage being paid off. The machinery in question consisted of a steam-engine and boiler, fly-wheel, circular saws, and apparatus for working the same: Held, on the bankruptcy of A., in the absence of any words expressive of any intention to include the machinery, that the security did not extend thereto. A party claiming a lien upon machinery in respect of the unpaid purchase money thereof may not, on the bankruptcy of the purchaser and a mortgagee's petition to have the machinery sold under the directions of the court, object to the jurisdiction or refusal to concur. *Exp The Western Bank of London, re Gabriel*, 31 Law Tim. Rep. 105.

FI. FA.—*Costs of, not proveable for.*—The costs of a *fi. fa.* used upon a judgment, by virtue of which the sheriff was in possession, but had not sold at the date of the petition for adjudication, is not a debt proveable under the bankruptcy. *Exp. Bethell*, 30 Law Tim. Rep. 296.

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CONVEYANCING PRECEDENTS.

(vol. 8, pp. 135, 383).

To the Editor of the "LAW CHRONICLE."

SIR,—I venture to trouble you with a few observations on the above subject in answer to the communication from "H. S. Y." which appeared in your last number.

I beg leave to differ from his opinion as to the remoteness and consequent validity of the limitation referred to, and in so doing I think I can show that the limitation referred to does not infringe the rules laid down by 40 Geo. 3, c. 98, as to perpetuities.

At page 539 of Fearn on Contingent Remainders, and executory devises, 9 Ed., the effect of the statute is stated to be that no person can create a trust for accumulation to continue for any further period than—1. During his own life; 2. For 21 years from his own death; 3. During the minority of any person living at his death, or then *in ventre sa mere*; 4. During the minority of any person who, for the time being, would be entitled to the rents, &c., if of age.

Now, it appears to me that although in the case referred to there may be a postponement of the vesting of the estate for 41 years after death of Frances, yet that does not at all affect the validity of the limitation; for it is a matter of course that, if at the expiration of 21 years from the death of tenant for life, the person who, if of age, would be entitled to the rents, &c., be an infant, the accumulation must continue till he become adult, which may be nearly 21 years more, or in the whole 41 years from the death of tenant for life.

And this appears to be within the rules before laid down; for the first limitation is assumed to be to Frances for life, the second to such of her children as should attain 21 (and which may be 21 years after her death, and which is identical with the limitation contained in the third rule before mentioned), and the third limitation is to such child or children of any son of Frances who might die under the age of 21 years, as should live to attain 21, &c. (and which corresponds with the fourth rule).

Thus, although accumulation *might* continue for 41 years after the death of Frances, the person ultimately entitled is ascertained within 21 years from her death, and is consequently within the provisions of the act, 39 & 40 Geo. 3, c. 98.

L. C.

Your correspondent, L. C. (with whose remarks I have, to save time, been favoured), treats the case as being one under "The Thelusson Act," and as if it were a trust for accumulation. This is not so. It is a precedent solely governed by the rule against perpetuities, and relating to the vesting of the property itself. The limitation is, "To Frances for life—remainder to her children who attain 21; and

the grandchildren, who attain 21, of a child dying under that age."

Now, if you cannot, as soon as you have drawn the clause (p. 135 *ante*), assert that these children, and every grandchild, *must* necessarily all be ready to take within 21 years after the death of Frances, you have drawn a clause which will transgress the perpetuity rule, and therefore be void. The rule is that the vesting of an estate or interest in property cannot be postponed "beyond a life-in being, and 21 years after." Admitting, as L. C. does, that 41 years may elapse from the death of Frances, before the property may absolutely and entirely vest, it is surprising that any doubt should exist upon the subject. Still more is it marvellous that a limitation void for remoteness should be attempted to be upheld by the Thelusson Act, which, in addition to its not relating to or affecting the perpetuity rule, was designed to place a restriction upon the period, within which that rule allowed the accumulation of income.

Miser Thelusson, by his will, steered clear of the rule, and avoided collision with it. He only directed what the rule enabled him to do—viz., an accumulation of income for the same period, that he could postpone the vesting. The act passed in consequence; and which, though not interfering with his will, is always named after him, restricted accumulation, to a period much less than the time within which vesting may be postponed. As a general guide, it may be considered that the twenty-one years after a testator or settlor's death is the length which is to determine the height of any heaping up of income. A minority, or twenty-one years, is the "strike" which is to keep down the heap. It is, therefore, manifest that the Thelusson Act can never produce an extension of the perpetuity rule; nor even allow an accumulation of income to the extent of that rule. It is, however, to be admitted, that if you can show that a direction to accumulate is good within the act, then the postponed enjoyment of the property must be within the rule, and, consequently, valid. This is, I presume, what L. C. intended when he introduced the Thelusson Act in a question of remoteness. The fourth period of time referred to in his letter will, he thinks, operate to save the precedent from the objection of remoteness, which period is, "during the minority of any person who, for the time being, *would be entitled to the rents, if of full age.*" Of course, L. C. means to assert that every grandchild of Frances would, if of age, say within twenty years from her death, be entitled to share the rents. If so, he should have attacked the authorities I refer to, which show that such is not the case, and that the *possibility* of any grandchild not attaining twenty-one until more than twenty-one years after Frances' death, is a reason for holding the limitation void. It is "begging the question" to say that every grandchild, if of full age, would be entitled, and, therefore, the clause is valid. And it is arguing in a circle to say that the grandchildren are entitled because the clause is within the Thelusson Act, and the act applies because the grandchildren are entitled under the clause (see *Haley v. Bannister*, 4 Madd. 275).

H. S. Y.

MOOT POINTS.

No. 1.—*Will—Lapse—Trustees.*

It is a well-established rule of law that if a devisee (not being such as is provided for by the new Will Act) dies before the testator, the gift is ineffectual as to the heirs of the devisee; formerly, the heir-at-law of the testator was entitled, and now the residuary devisee is (supposing the gift to be in tail, or for the benefit of the testator's issue or residuary, 1 Vic. c. 26, ss. 32, 33, 25). I wish to be informed how the case was where there was a devise of real estate to trustees and their heirs, and all the trustees died in the testator's lifetime. Should he have republished his will, appointing new trustees, or would a power to appoint new trustees, if extending to the case of the death of the trustees in the testator's lifetime (which, I believe, is customarily, though not invariably, done), be effectual, or would the heir-at-law be clothed with the trust as a matter of course, or must the matter have been thrown into Chancery?

W. H. S.

No. 2. *Trustee—New appointment—Representatives.*

A. was the sole trustee under a settlement of personal estates, and by the clause in the deed it was provided that, in the event of his death, his personal representative should appoint a new trustee in the place of the original trustee. A. died, and B. has taken out administration to him, but refuses to appoint a new trustee, or in any way to act as trustee, though she has the trust-funds in her hands, or, at least, allows them to remain in their state of investment, some being out at mortgage, and other portions being in the funds. B. declines to act otherwise than as administrator of A. What course can be adopted to obtain an appointment of a new trustee? and if the application must be to the court, will one new trustee be considered sufficient, there having been originally but one, or will the court insist on there being two new trustees? Will not the court direct B. to pay the costs of the application, if not personally, at least out of the assets of A., on the grounds that the latter undertook that his representative should appoint a new trustee, and that it is from a failure on the part of the latter that the expense of an application to the court has been incurred? It is assumed that the personal representative of a trustee does not, by taking out representation, become a trustee so as to prevent the necessity for appointing one in the place of the original trustee, but is not such representative for some, and what, purposes to be considered as a trustee?

O. S.

No. 3.—*Charge of Debts.*

A., by his will, charges his debts on his real

estate, which he devises to B. in fee beneficially. Will this charge amount to a trust, and so stop the running of the Statute of Limitations? It is to be borne in mind that, though if a testator charges his real estate with the payment of his debts the estate stands charged in the hands of the devisee, yet the devisee is able at any time to dispose of the estate to a purchaser discharged from the debts, and to give a valid receipt for the purchase-money (*Spackman v. Timbrell*, 8 Sim. 253; *Richardson v. Horton*, 7 Beav. 123; *Doe v. Hughes*, 20 Law Journ. Exch. 148; exp. *Baine*, 1 Mont. D. and De G. 492; *Browell*, 155; *Prideaux*, 603, 2nd edit.; *Burt. Comp.* p. 1508, note). Also, it has been decided that if an estate be given to one, to hold subject to a charge, the grantee is not a trustee, so as to prevent the Statute of Limitations running (*Hughes v. Kelly*, 3 Dru. and Warr. 482; S. C. 2 Con. and L. 223; *Francis v. Grover*, 10 Jur. 280; S. C. 5 Hare, 36; *Prideaux*, 604). The latter class of decisions raises the question intended to be here considered—namely, whether a charge of debts differs or not from an ordinary charge on land, say of an annuity, or of a gross sum? If not, it should seem that the charge of debts would not, as many text-books say it would, operate by way of trust, and so stay the operation of the Statute of Limitations.

W. H. S.

No. 4. *Notice to Quit—Forcible Possession.*

A. lets B. a cottage and garden as a weekly tenant, and gives her a proper notice to quit, by leaving it at the house with her daughter. B. was absent and did not return. At the expiration of the notice, the daughter locks up the house, with, it is believed, a few articles in it, and then leaves the town, taking the key with her. Can A., under these circumstances, take forcible possession? The mooter is under the impression she can, and that a case was decided a short time ago to that effect, although he cannot find it. He would, however, be glad of an opinion, or a reference to that case.

W. M. S.

No. 5.—*Devise—Rule in Shelley's Case.*

An estate is devised in the following words:—"To my grandchildren, B., C., and D., I give my estate Whitacre during their lives as tenants in common. And from and immediately after their respective deaths, I devise my said estate to their respective heirs and assigns for ever as tenants in common equally."

Will the rule in Shelley's case apply here? or, in other words, will the gift of a life estate to B., C., and D., as tenants in common be considered for the purposes of this rule as the simple life estate in the strict application of the rule; the result upon the whole devise being to give B., C., and D., a tenancy

in common in the fee of Whitacre (Cruise on Real Property, vol. 4, p. 374), where the prior estate is a joint tenancy? This view of the case is not doubted to be correct; but correspondents are requested to refer to books or decisions in support of it.

G. C.

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WE must confess that we have never felt so much doubt and difficulty in noticing a work as we experience in noticing the above. On the one hand, we feel that the author has discharged his duty in a most painstaking and worthy manner; and on the other, we feel that we cannot recommend our readers to make use in practice of his labours—a most cruel result. It is pretty well known to our readers that we are prepared to support a more reasonable form of conveyancing than that at present in use; but we conceive that it must be founded on the existing system. In our opinion, any really useful reform must consist in a judicious retrenchment of the present verbose forms, and we think there are signs that such is the opinion of some of the writers who have favoured the profession with forms. Among these we may mention Mr. Horsey's edition of "Cornish's Conveyancing Precedents," which we have before noticed. Had Mr. Prior adopted a similar plan, his work would have been useful to the profession, and his own labours have been considerably lessened. However, Mr. Prior has chosen another course, and we are sure a sense of honesty has induced him to do so, and he has, at any rate, the merit of being original, and of exerting himself to produce a work differing from all others in existence.

The present volume, which, it appears, is to be followed by another, contains, as the title-page informs us, what conveyancers call "*Common Forms*" and "*Precedents*" of the ordinary forms of assurances in all the usual branches of practice. It is but fair to Mr. Prior—and, indeed, more than any ordinary author, he deserves to have his views fairly set before the profession—to let him speak of his own labours, and accordingly we present the following extract from the Preface to the work:—

"It is now time to refer to some of the principles by which it is conceived conveyancing might be reduced (without any violent change, or such as would require the aid of legislative enactment) to a form not less certain and precise, but far more simple than what is ordinarily in vogue. Now, the points in the present system most requiring correction appear to be the employment of recitals, and the almost in-

variable want of generalisation. As regards the former of these, it really seems wonderful (excepting for the reasons above stated) how such a practice could ever have been considered necessary or even tolerable. To a lay mind, it would certainly appear enough that a conveyance from A. to B., should be a conveyance from A. to B., without being a history of A.'s antecedents (and, perhaps, those of one or two of his ancestors) as well. No doubt, as a literary production, a conveyance is much more complete and satisfactory for exhibiting the preliminary state of the title at length—but, as in practice, this has always been well sifted beforehand, and every party to the instrument is assumed to be cognisant of it, it does seem monstrous that the entire process should be gone through again, and the draft swelled to thrice its length, for the benefit of some exoteric reader in after times; who, even if he exist, will not accept these statements on the faith of the document itself, but require their strict proof, viewing the document not as an isolated fact, but as merely one link in the chain of title. But it may be fairly urged, should a conveyance then be in every case a mere general transfer of the parties' interest, without identifying in any manner the capacity in which they execute? Certainly not—and if it should hereafter happily form the subject of a 'General Order,' that recitals in deeds should not be allowed for on taxation except under special circumstances, the character and grounds of execution by the different parties (framed so as to include the benefits of 'estoppel,' and others of a similar nature) would be the principal test of the conveyancer's skill. It is quite easy to frame such a statement in language clumsy, involved, and even lengthy—but it is also possible, although perhaps not easy, to include it in terms which shall neither encumber the draft nor perplex the reader."

NOTICES TO CORRESPONDENTS.

H. E. M.—The completest, and perhaps the best, work on Bankruptcy is Mr. Flather's edition of "Archbold." Our articles in Vols. I. and II. would, we think, so far as they go, be found sufficient for the examination; and, indeed, for that they may be considered complete. There must be a full term's previous notice, and a little more—i. e., the notice to the Master should be given three clear days before the commencement of the term preceding that in which the examination and admission is to be had; and one full term's notice in two judges' books.

Lxx (Sheffield).—We do not think it necessary to notice the subject any further. It is probable that it will, as you say, injure the society, instead of benefiting it.

W. M.—We cannot say more exactly than before, but we should think the publishers would not delay Stephen longer than can be helped.

T. J.—We are obliged by your exertions on our behalf. Perhaps we shall shortly recommence the library.

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TRANSFER OF LAND.

The Parliament and the press are determined that the subject of the cheap transfer of landed property shall not sleep; and we are informed that to the three bills already brought in, the Attorney-General is about to add a fourth. This is really a matter of serious importance to the profession, for whilst there can be no objection to any reasonable scheme for facilitating the transfer of land, it is a different matter to allow the adoption of one which shall have the effect of entirely superseding professional assistance; and that is the unmistakable aim of more than one of the originators of the new bills, and would probably result at no great distance of time, from the adoption of any of the plans. It should be remembered that in such a case we may apply the saying that "it grows by what it feeds upon;" having reduced the solicitors emoluments very considerably, we should speedily have proposals for the destruction of the small remainder—an event by no means "contingent." Very recently, Lord St. Leonards has favoured the House of Lords with his views upon the various measures for facilitating the transfer of land, in the course of which his lordship observed that he believed it would be impossible to give a common law facility to the transfer of landed property, and at the same time retain the power of creating settlements and jointures without interfering with the title to the fee simple. No other country but England possessed this facility. It had been said, that a certificate of title ought to be as negotiable as a bill of exchange. He hoped he should never see such facility for the transfer of property. If a man could carry his title-deeds in his cigar-case, no one would answer for the consequences. There was no necessity to render property so easily transferable; for if a man wanted to raise money on his property, he could do it by mortgage. After noticing the ancient modes of transfer by delivery of seisin, and otherwise, and the abuses which had thence arisen, he said that the Legislature and the judges had always shown great anxiety to protect purchasers. Formerly there used to exist several great protections against fraud; as, for instance, the power to bar a right for non-claim, and the creation of terms attendant upon the inheritance; but those safeguards had, he regretted to say, long been all swept away. The Court of Chancery had laid down a rule which was very conducive to honest dealing, but which had led to inconvenience—he meant what was called the doctrine of notice. Where the notice was express, and to the party himself, nothing could be more proper than that doctrine; but unfortunately the courts of equity had gone much further, for they had set up a construc-

tive or implied notice. If, for instance, he employed an attorney, believing him to be an honest man, to purchase an estate for him, and if it could be shown that that attorney had any knowledge of any incumbrance upon it, it would be inferred that the purchaser himself was also aware of it, and he might lose the estate he had just bought, and lose it without any fault of his own; indeed, it might have been utterly impossible for him to have known of the incumbrance. He thought the time had arrived when an alteration might be made in respect to that doctrine. In another respect the present practice required amendment. It was held that a *lis pendens* was notice to all the world; in other words, every purchaser was presumed to know every fact in relation to the property he was buying that might have been disclosed in any suit then pending. That rule was based upon the assumption that every Englishman was bound to make himself acquainted with whatever took place in the courts of justice—a manifest impossibility. It would be a great improvement, and save an enormous expense, if matters affecting property which were disclosed in the course of suits could all be brought into one office, so that search might at once be made for them. The great expense of the transfer of land arose from the circumstance that men did not choose to depend upon anybody but their own advisers. If a man wanted to buy an estate, he insisted on having a laborious and costly investigation into the title gone through by his own solicitor, and the result advised upon by his own counsel; although the estate might have been purchased only three months before, and exactly the same process had already been gone through. One of the chief dangers to be guarded against in the purchase of real property was, lest there should be a concealed incumbrance. To avoid that, various plans had been proposed. Amongst others was a scheme for the registration of deeds. A bill with that view had been brought in by the Lord Chancellor; but he (Lord St. Leonards), thinking that it would be mischievous, and would lead to much expense, had felt it his duty to oppose it. He had arrayed against him all the noble and learned lords in that House, and the bill was passed: but in the other House it was summarily rejected. The result was, the appointment of a Royal Commission, who had lately made a report, and whose labours it was intended to embody in the shape of a bill. Nobody could read that report without being deeply impressed with the great learning, knowledge, and ability which it displayed; but he was sorry to be obliged to add that he could not in the least agree with the conclusions at which the commissioners had arrived. Their plan was not to have a general registration—that was to say a registration of every

deed and of every assurance; but they recommended what was called a registration of titles. What they proposed was, that some one should be registered who was the owner of the estate, with power to sell or mortgage it; but it would not be possible to register any estate in which a settlement had been given. The commissioners began by making this registration voluntary; but after an estate had once got upon the register, it could never disappear from it. What was proposed was in truth that the Government should open a shop for the sale of good titles. But that could never be endured; and, therefore, notwithstanding the great authority of the commissioners, he must give the proposal his most decided opposition. It must be obvious that a person who went to the office and asked to have his property registered would have nobody to oppose him; his application could be no more than an *exparte* one; and yet if it was granted, the real owner of the estate might find his claim barred. By the law of England any man who had a right to any property might recover it; but, according to the commissioners' report, if he recovered it, he would not have it; he would only receive a money compensation. Nor was that all. The scheme contemplated in many cases that a sham owner should be registered; but this sham owner would, nevertheless, have an undoubted right to mortgage or sell the estate. To guard against that, it was proposed to establish a machinery of caveats or injunctions, the result of which would be to invoke the Court of Chancery on every possible occasion. In a word, while attempting to make the transfer of land as simple as that of a railway share or £50 stock, the commissioners had run the risk of incurring the gravest possible inconveniences, and they had sacrificed altogether their lordships' power of making settlements upon their own estates; for it was impossible to preserve the rights of property if they conveyed to any person other than the real owner the legal fee simple. There were some things involved in the Report at which it was hardly possible to repress a smile. For instance, under the new system, it would be impossible for two men to purchase an estate together. At present that was often done; and the property was conveyed to them as tenants in common; but under the proposed plan that would be impossible, unless they agreed to give the survivorship to one of them. The Lord Chancellor informed them the other evening that he was about to lay on the table a very different measure in reference to registration; and Lord Brougham had laid on the table another bill respecting the registration of deeds. That bill, he apprehended, would entail the necessity of maps, and it should be remembered that the maps of the

Tithe Commission had already cost £2,500,000. He would now state the objects of the Bill that he intended himself to introduce, which was not a bill for the registration of titles, but for simplifying titles. He proposed to remove obstacles to the transfer of land; to restrict the present power of limitation; and that a purchaser's title should be indefeasible if he had been in undisturbed possession for twenty-five years; but he would not take from any man the right to recover charges on property.

BILLS IN PARLIAMENT.

Omission to recite acts intended to be repealed, amended, or superseded.—The principal defect observable in the bills now pending in Parliament is, that most important measures, by which numerous existing acts will be virtually repealed, amended, or rendered obsolete, do not contain any recital of the existing acts which will be affected by the pending measures, nor are such existing acts proposed to be expressly repealed.

Alleged impossibility of ascertaining existing acts.—The existence of this defect in our current legislation is admitted, but it is excused on the alleged ground that acts "are altered in one session, and then in another; and seeing how the sections conflict, no human being can advise upon them with any certainty, and one can scarcely tell what is the state of the law." The preceding paragraph is part of the evidence of Mr. H. B. Ker before a committee of the House of Commons on the 3rd March last; and as this gentleman describes himself as the only paid member of the Statute Law Commission, and as assistant to the Lord Chancellor in considering bills pending in the House of Lords, his position entitles his opinions to be received with deference, especially as on the same day, and in proof of the difficulty of tracing the existing statutes upon any particular subject, he cites a case in which he prepared two bills with reference to the office of Chancellor; and although he prepared them with as much care as he could, he afterwards discovered that there were eight or nine statutes which he had not referred to, and which were not in any index relating to the statutes. In this particular case (to use Mr. Ker's own words), "it did not signify, as the bills did not pass;" but as it is not desirable that this source of consolation should exist in the case of every important bill submitted to Parliament, it is most necessary that an efficient remedy for this admitted evil should be provided without delay.

Remedy suggested in the form of an authentic edition of existing statutes.—It is submitted that the most effectual remedy would be the adoption by the House of Commons of the motion of which Mr.

Locke King has given notice—viz., for “an humble address to her Majesty, praying that she will be graciously pleased to take such measures as may seem most expedient to cause an edition of the statutes at large to be prepared, including all public statutes and parts of statutes in force, and omitting all such statutes and parts of statutes as are expired or have been expressly repealed; and that in the place of the statutes or parts of statutes repealed or expired, there be inserted the titles of such statutes, and the respective numbers and abstracts of the clauses so repealed or expired; and in the case of repealed statutes or parts of statutes, a reference in the margin to the statutes by which they are so repealed, with the view hereafter of forming an authentic edition; and to assure her Majesty that this House will make good whatever expense her Majesty may think proper to be incurred on that account.”

Difficulty of distinguishing between existing statutes and those repealed, expired, or obsolete.—The great bulk of the statutes is only part of the difficulty encountered by the legal student: he may, after great difficulty and research, succeed in finding a statute upon any given subject, but there is nothing to assure him that it is still in force; and until he has examined all the statutes subsequently passed, he has no certainty that it may not have been repealed or amended. To show the working of the present system, a case will be mentioned that occurred very recently:—A gentleman, interested in a matter pending before Parliament last year, purchased, at the Queen's printers, a copy of a statute relating to the subject, and acted upon its provisions. In a short time he learnt that this statute had been repealed by another act passed a few years afterwards. He procured this second statute, and as its provisions were in accordance with his proceedings, he continued them; but he subsequently ascertained that this second statute had been also repealed, and that the provisions of the third statute passed upon the subject did not sanction his proceedings, so that the two first statutes purchased had been the means of misleading him as to the existing law upon the subject in which he was interested. This case is not a solitary one, as it is of frequent occurrence that statutes are purchased which have been repealed; but which fact being unknown to the purchaser, he acts upon the document he has purchased, in the honest belief that his proceedings are in conformity with the law.

Practicability of preparing an authentic edition of the statutes.—These difficulties would be obviated by the publication of an authentic edition of the statutes, in which every statute that has been subsequently amended or repealed should contain a marginal note referring to such subsequent statute.

That the preparation of such an edition is practicable can hardly be matter of doubt, if the editorship were confided to a barrister who possessed both ability and application; and many gentlemen possessing both these qualifications could be found in the profession willing to undertake the office, although it is possible that, to secure an efficient editor, it might be necessary to look beyond the circle of gentlemen who now enjoy the Government patronage and favour.

Course of proceeding in preparing the work.—The course of proceeding in preparing an authentic edition of the statutes would be to commence with the latest session, carefully endorsing upon acts amended or repealed a reference to the repealing or amending act, and by thus perusing session after session, all the accuracy that is possible would be secured; and in cases of doubt as to the total or partial repeal of any statute, it should be retained, and the facts stated in a note annexed to such statute; and although it would be desirable that, in the first instance, the edition should be printed for the use of Parliament, yet, by its being retained in type, it would be a groundwork to guide Parliament in deciding which statutes should be retained, and which repealed; and when the doubtful cases had been settled, it might, by a declaratory act, be made an authentic edition of the statutes, not only perfect at the time, but capable of being continued so in perpetuity by repealed statutes being omitted, and new statutes being added under the superintendence of an editor acting under the authority of Parliament.

LIST OF CORRESPONDENTS.

WE have been compelled to delay the revised list until next number. Any additions or alterations should be notified as early as possible.

LEX (Sheffield).—We cannot speak with more certainty of the time of appearance of the new edition of Stephen.

J. S.—Write to the Secretary of the Society, at the Law Institution, Chancery-lane. We believe they adjourn about this time for the Vacation holiday.

A. B.—We do not remember receiving any such communication as that you refer to.

JUVENIS.—The prospectus was sent to you in order to ascertain whether you would support the proposed series of works. No commencement will be made until a sufficient number of orders is received.

X. Y.—We think you ought to pass, but so much depends upon the capacity of each student that it is impossible to speak with certainty. Readiness and coolness at the examination will go very far.

L. T. S.—We think there is sufficient “Summary,” and we are satisfied that if you carefully read it each month, you will obtain a considerable amount of practical information in the course of the three years you have yet to serve. The promised volumes of Sweet's Jarman have not yet appeared.

The Law Chronicle.

No. 40—Vol. IV.

SEPTEMBER 1, 1857.

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We trust we shall shortly have to report a large addition to the above names, as at present the number is very small, compared with the large body of articulated clerks in town and country, and, indeed, as compared with the number which we formerly had the pleasure to publish. There surely must be many among the recent subscribers who will be anxious to avail themselves of the advantages of the correspondence system. There is no expense attendant on it: all that is required is, for any one to intimate a desire to have his name inserted in the list.

THE REPORTING SYSTEM.

The multiplication of law reports is producing a feeling that for the sake of the members of the profession something must be done; no person is able to keep up with them, however much inclination he may have so to do. Our work is intended to ease the profession in this respect, and we know that its usefulness is recognised, but still many practitioners feel a necessity for recourse to the fountain heads, or at least they desire to procure the original reports, but the number is too large, and they are obliged to limit themselves to a certain portion only. Mr. Baron Bramwell has lately stated publicly that "Lord Wensleydale told me, and my own judgment goes with it, that no judge can do his duty who does not read the reports. . . . When I was at the bar, I did not read them, and I did not pretend to read them, and my clients knew that I did not read them, and they took me for better or for worse, with notice. [His Lordship doubtless refers to the time when he was one of the leaders of the bar in full practice. At that prosperous period of a lawyer's career, the demands upon his time and attention are so incessant that he finds it very difficult to read reports systematically; but then he is constantly in the midst of the arguments, trials, and judgments which are reported; is personally engaged in the more important; and is daily hearing of moot and decided points. Let no one, who has not attained to so distinguished a position at the bar, think that he can dispense with a careful study and noting of reports.]. But I cannot serve the public in that way, and I read them now diligently and faithfully, and they require time. I do not mean to say that the reading of them is laborious, because, from long habit and inclination, I do not say but that the reading of the reports occasionally is rather an amusing thing." To the question, "Do you read all the multifarious reports—namely, the Jurist, the Law Journal, the Justice of the Peace, and the Law Times?" the learned judge answered, "No; I read what I suppose you may call the orthodox reports of the three common-law courts—namely, Ellis and Blackburn, the Common Bench Reports, and Hurlston and Norman. I read the Law Journal Reports, equity and common law, and I read the Jurist Reports. . . . It may be asked, why does one read the same thing in duplicate? My answer to that is, that if I distinctly comprehend the case when I read it, I do not trouble myself to read it again; but it very frequently happens that you find varieties of expression in the judgments, where they have not been considered and written, of such a character that it is quite desirable that you should read both reports. You may find that one reporter

is struck by one remark, which he puts down, and while writing it, not being an accomplished shorthand writer, something escapes his attention which the other puts down."

In reference to this very important subject of law reporting, we may refer to a letter which lately appeared in the *Times* newspaper, wherein the writer states:—"Again, cases are often reported in which no new principle is enunciated, but the decision in which merely goes on the facts of the cases themselves. This swells the volume, as also does the length of the reports. No one who is conversant with the old reports of fifty or sixty years since is not struck with the conciseness of them as compared with the new reports—I ought rather to say with the amplification of the new as compared with the old.

"The evil is daily increasing. I have heard the present attorney-general say that the reports were accumulating beyond even his power of mastering. Perhaps our book-shelves are loaded with twenty new volumes of reports a year! And remember, Sir, the numerous acts of Parliament of which so much complaint is made only furnish us with one volume of law every year. It would seem that the evil should be stopped, and the following is a remedy I would propose:—

"1. In each court there should be an officer of the court to report such cases as the judge should think, from some new principle evolved, worth being reported. (By the way, the officer should have a deputy, as he would have very little to do.)

"2. The reports of all the courts should be published together, by order of the Lord Chancellor, about once a month, and should be published at a moderate cost.

"3. When a case has been re-argued before the Court of Appeal, having been once stated in the reports, it should not be re-stated, but the decision on it merely.

"In conclusion, your correspondent 'Mercator' says that the issue of bank-notes should bear a strict proportion to the amount of bullion in the Bank of England. Oh! that in legal matters the issue of the reports and their cost might be in some proportion with the bullion contained in them."

THE PROFESSION—SOLICITORS AND ARTICLED CLERKS.

In the last report issued by the Incorporated Law Society, among other matters it is stated a communication was received from the Metropolitan and Provincial Law Association on a proposed new scale of costs on criminal prosecutions; and the secretary having obtained copies of the several scales pro-

posed by the treasury as applicable to proceedings both at the assizes and quarter sessions, a letter was written to the Lords of the Treasury upon the subject; and in answer the council were referred to the gentlemen who had been commissioned by the treasury to consider and report upon the matter.

Several questions of professional usage on conveyancing matters were taken into consideration: amongst others, as to the costs of a release and indemnity where the original deed had been lost; the cost of a contract of sale, and its preparation by the vendors' solicitor; the settlement of an action between the parties and the plaintiff's attorney, in the absence of the defendant's attorney; retaining fees on elections for members of Parliament.

The attention of the council was called to a decision on the trial of an action against one of the members of the Society, which appeared to increase the liability of attorneys to a serious extent; and the secretary was directed to obtain the shorthand writer's notes of the case, and to make inquiries on the subject of an intended application for a new trial. It was afterwards reported that a rule for a new trial had been granted.

The Secretary reported that the rules for striking two attorneys off the Roll had been made absolute by the Court of Queen's Bench; and directions were given to apply for the removal of the names from the rolls of the other courts of law and equity.

Several applications for the renewal of the annual certificate of attorneys, with the affidavits and testimonials in support, were considered. In one of these cases the council successfully opposed the renewal, at the instance of the Newcastle Law Society.

In another case which had been referred to one of the Masters, the court, on a special application, enlarged the terms of the rule, authorised the examination of witnesses *viva voce*, and directed the applicant to produce his account-books, papers, and writings before the Master.

An application having been made to renew the certificate of an attorney who had been remanded by the Insolvent Debtors' Court for several breaches of trust, counsel was instructed to oppose the renewal. Cause was shown in the first instance, and the rule was refused.

The Examiners' Report of Trinity Term was received, recommending two candidates to the Council as deserving of prizes—viz., Mr. Edward Balden, of Birmingham; and Mr. Walter Browne, of Lenton; and three as deserving of certificates of merit. The books proposed by the several candidates having been approved, were presented by the Council, and certificates of merit granted to the others—namely, Mr. Joshua Fallows, jun., of Piccadilly; Mr. Wm.

Stewart Forster, of Lewisham; and Mr. Wm. Henry Randles, of Ellesmere.

A letter was received from Mr. Arden, the Principal of Clifford's Inn, communicating the resolution of that Society to grant a prize of twenty guineas annually, to be appropriated by the Council in prizes for the candidates who should pass a superior examination.

Several questions were considered relating to the due price of articles of clerkship under the provisions of the 6 & 7 Vic. c. 73, s. 12.

Measures for the improvement of legal education and a proposed college of attorneys having been noticed at the Annual General Meeting of the Society on the 23rd June, letters were written to all the Inns of Chancery, with copies of a former communication, and inviting their consideration of the subject.

Devise to trustees and survivors.—A devise to two trustees and the heirs of the survivor (which, though very improper, is not uncommon) makes them joint tenants in fee (Burt. pl. 293.)

Sale of goods after execution.—A sale of goods after execution delivered to the sheriff, except in market overt, was formerly void against the execution creditor: the delivery of the writ to the sheriff bound the property in the goods, except against a purchaser in market overt; but by 19 & 20 Vic. c. 97, s. 1, a *bonâ fide* purchase for value without notice of the writ will defeat the execution where there was no actual seizure.

NOTICES TO CORRESPONDENTS.

J. C.—You will be in time for Hilary Term, if you give your notices in due time. Your reading has not been sufficient, but perhaps your practical knowledge will suffice to get you through.

LEX (Sheffield).—The new edition of Stephen is not yet out.

M. A. L.—We have determined to make a commencement this month (September), as you will perceive by the advertisement.

W. Y.—Write to the secretary at the Law Institution. No doubt there is some fee payable.

LAW STUDENTS' LIBRARY.—This new work will be commenced on the 15th of September instant, and we trust our friends will rally round us, for at present we have not so many subscribers as we ought to have, though names are now coming in every day. Let not our readers rest content with sending their own orders, but endeavour to get us subscribers. We shall be happy to send prospectuses with this view to any gentlemen who may be willing to assist us.

Printed and published by THOMAS F. A. DAY, at his residence, No. 13, Carey-street, Lincoln's-inn-fields, in the parish of St. Clement Danes, in the county of Middlesex.—Tuesday, September 1, 1857.

The Law Chronicle.

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The LIBRARY will be brought out in numbers, of which one will be published monthly (on the 15th of each month), containing 40 pages of octavo size, price 1s., making an annual subscription of 12s.; for which sum, it will be sent post free to subscribers. It can also be obtained through the booksellers in the usual way. Each work will cost about 6s. No. 1 will appear on the 15th of September, 1857. The advantages of the LIBRARY are so palpable, that it is to be supposed that no Articled Clerk will hesitate to support it.

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ANSWERS TO MOOT POINTS.

No. 12.—*Married Woman* (*ante*, p. 107).

The liability of a husband, upon contracts entered into by a wife, for things necessary and proper in her station of life, rests upon an implied agency arising out of the intimate connection subsisting between married persons; and, so long as the parties cohabit, the burthen lies upon the husband of disproving the agency, or, at least, showing that it is not a case for its implication (see Macqueen's Law of Husband and Wife; *Emmett v. Norton*, Car. and Pay, 306; and *Freestone v. Butcher*, 9 Ditto, 648). But when a separation ensues, the legal position of the parties is reversed; the non-liability of the husband is *prima facie* presumed, and, in order to establish a case founded on this implied agency, the party seeking to enforce the contract must show that the act of separation was not the fault of the wife (see Macqueen, 140, and the cases there cited)—a condition which is certainly not fulfilled in this case. Consider the very equivocal position in which the wife must come before the court: and it is upon the merits of her case that that of B. must stand or fall. The law gives her (by a fiction of its own) a certain power. *She neglects* to avail herself of that power (I mean, of course, that of purchasing necessities). *She then leaves* her husband on the ground of an existence of a state of things the natural result of her neglect; and *she then comes before* the court and claims the benefit of that power which was (when within her reach) despised. If she chooses a state of separation, she must take it with its disadvantages. The court could take no steps in favour of her, or those claiming through her, in the face of such facts as these, until the married persons are placed in *statu quo*; by a renewal of the state of cohabitation, and assuming the non-liability of the husband to be beyond doubt, I do not see how B., consistently with any rule or principle of law, can have any remedy against the separate estate of A. (which I presume to be personalty), accompanied as it is with a restraint on anticipation. I know of no decided case in which this clog has been removed until it releases its hold by the death of the parties, or the dissolution of the marriage. I think, therefore, that B. cannot recover so long as the relation of marriage and state of separation continues.

A. L. TROTMAN.

Moot Point suggested by No. 12, and to be taken in connection with my Answer to the same.

Assuming that B. (the payee of the note) has no remedy against any one while the marriage and separation continue, and assuming that he will have

a remedy against A. in case she survive her husband, what will be the legal position of B. supposing the husband to survive? I have hastily formed an opinion that, inasmuch as the separate estate will lose its special nature immediately on the decease of the wife, and the husband's right by administration will attach *eo instanti*, there can be no room for any third party to assert a claim against A. If I am right, B. is, indeed, in evil case. But it is a point on which I should like to hear better opinions.

A. L. TROTMAN.

No. 9.—*Will—Power to Sell* (*ante*, p. 106).

By the parallel case cited (*Bentham v. Wiltshire*), it seems clear that the power of sale would not vest in the executrix by implication; she, as such, having nothing to do with the distribution of the produce of the sale.

I think, however, that the heir-at-law, having been one of the conveying parties, the conveyance to G. H. would be effectual.

VENATOR.

No. 12.—*Married Woman* (*ante*, p. 107).

In this case the husband of A. would be liable to B. to the value of the articles, being necessaries, proved to have been delivered to A., and which were purchased with the borrowed money. At law the husband would not be liable (*Earle v. Peale*, 1 Salk. 387), but in equity, upon proof of the money having been properly expended in the purchase of necessaries, B. would be allowed to stand in the place of the persons who actually supplied the necessaries to receive satisfaction, to the extent mentioned above, from the husband (*Harris v. Lee*, 1 P. Wms. 488).

Again, the separate estate of A. would be liable for the amount of her promissory note. The doctrine is clearly established, that where a married woman, possessed of separate estate, gives a promissory note, payment can be enforced out of her separate property; and, in one case, it was held that a married woman's promise in writing to pay a debt charges her separate estate in the same manner as her bond or promissory note (*Bullpin v. Clarke*, 17 Ves. 365; *Murray v. Barlee*, 4 Sim. 82; *Stuart v. Kirkwall*, 8 Madd. 387; *Field v. Sowle*, 4 Russell, 112; *Nail v. Punter*, 5 Sim. 562).

VENATOR.

LIST OF CORRESPONDENTS.

The following are the only additional names to the List published *ante*, p. x—namely, Mr. A. Lumb, Penrith; Mr. A. L. Trotman, Wellingborough, Northamptonshire.

The address of Mr. T. J. Peacock (late of South-square, *ante*, p. x) is now at J. Cutts, Esq., solicitor, Chesterfield."

ARTICLED CLERKS.

As the following communications are of general interest, we insert them with our answers thereto.

Clerk holding Appointments.

SIR,—I have been articled to an attorney for four years, and during that time I have held the appointments of clerk to a poor-law union, clerk to a district highway board, and receiver of tithes of a few small parishes. It has often been the source of uneasiness to me as to whether I shall experience great difficulty in passing, on the ground of my holding such appointments. Although I manage to attend to the business of the offices held by me, yet I do not neglect my employer's business; but, on the contrary, I almost exclusively manage the affairs of his office myself. In Mr. Maugham's work "*Attorney's Hand Book*," it is stated that an articulated clerk may hold during his articles, offices usually held by attorneys. I also observed, in the last Annual Report of the Council of the Incorporated Law Society, that several questions as to due service have been under consideration, and that questions as to service rest entirely with the examiners. Since reading that report, I have felt exceedingly anxious to ascertain (if possible) the decision of the examiners in cases similar to my own. Can you give me any light on the subject? Well knowing your readiness at all times to render assistance to articulated clerks, I have determined upon soliciting of you the favour of giving me some information.

NOTE.—We have several times advised articulated clerks not to accept such offices, unless they were engaged in them *only after the regular office hours*, but we are informed that the examiners are not so strict; and we believe if it can be shown that the clerk has not been so engaged as to encroach on the business-time which the solicitor required the clerk to attend at the office, the examiners will allow the service as sufficient. In other words, in such a case the clerk must show that such employments have been entered into with the consent and approbation of the solicitor, and that he has not neglected his employer's business, or lost any opportunities of seeing or engaging in the business of the office, and pursuing the studies necessary for his profession. But this is to incur a great risk, and we are not surprised that our correspondent should feel some uneasiness, especially as he holds no less than three appointments.—EDS.

Articles—Covenant to serve until Assignment.

In articles of clerkship there is a stipulation that the master shall assign on three months' notice, and the clerk covenants to serve for five years, or until such assignment. Query—Will the introduction of

the alternative operate so as to make the contract not "a contract for the full term of five years," or is it sufficient to satisfy the requirements of the statute and rules relating to service. It may be stated, that the master covenants to teach for five years, and the stipulation for the assignment is entirely distinct from his covenant. The clerk, however, covenants to serve five years, or until assignment, as above stated.

NOTE.—We do not think our correspondent need be under any apprehension, as it appears to us that the contract is sufficient to satisfy the requirements of the statute and rules. The contract is, in effect, to serve for five years—i. e., A. B. until assignment, and after assignment to C. D. for the remainder of the term of five years. Of course, C. D. will be a duly qualified practitioner, and as the service to A. B. and C. D. will make up the full term of five years, that period will be duly served. Indeed, in our opinion, a contract to serve A. B. for three years, and thereafter to serve C. D. for two years, so as to make up the full term of five years, would be sufficient, though we would not recommend its adoption on account of the questions which might be raised as to stamp duty, enrolment, &c.—EDS.

LEGAL EDUCATION—EXAMINATIONS—DUE SERVICE UNDER ARTICLES.

Although we have noticed some of the matters therein appearing, yet it may be useful to furnish our readers with the following extract from the last Report of the Incorporated Law Society, especially as many articulated clerks are greatly interested in that portion which relates to due services under their articles.

Classical examination.—The Council some time ago received suggestions for extending the requirements at the examination of candidates for admission on the roll; and in their previous Reports they stated the conclusions at which they had arrived—namely, to recommend to the judges to authorise an examination, either before, or during the articles of clerkship, or before admission, for the purpose of ascertaining that the candidates possessed an adequate degree of knowledge of the Latin and French languages, and of English history, geography, arithmetic, and book-keeping. A memorial to this effect has been prepared.

Prizes and certificates of merit.—The Examiners often regretted that, whilst they felt compelled at each examination to reject several candidates, who were unable to answer satisfactorily one-half of the fifteen questions in the three essential departments of common law, conveyancing, and equity, they were unable to award any distinction to those who passed their legal examination in a superior manner. After

much consideration, and with the concurrence of the masters of all the courts, who are *ex officio* examiners, the Council, on the part of the Society, deemed it expedient, in order to encourage the careful study of the law by the candidates for examination, preparatory to their admission on the roll of attorneys, to propose that the examiners should select the names of such candidates, not exceeding three, under the age of twenty-six, as in passing their examination should appear to have deserved distinction, with a view to the Council presenting to such candidates a prize of books, or any other testimonial which might be deemed fit.

This proposition has been attended with beneficial results. In Michaelmas Term last, the examiners selected only one candidate for a prize of books; in Hilary Term, three were selected; and in Easter Term, three prizes were again awarded; and it having been observed that some of the candidates, though not entitled to a prize, were but little inferior to those who obtained it, the examiners reported four more whom they deemed entitled to a certificate of merit; and this recommendation has been accordingly carried into effect. In Trinity Term two prizes and three certificates of merit have been granted; making during the year nine prizes and seven certificates of merit. The names of these candidates are stated in an appendix to this Report.

On this subject the Council are much gratified in adding that the Honourable Society of Clifford's-inn, one of the ancient inns of Chancery, has recently come to the following resolution:—"That in order to promote and encourage the efficient study of the law, a sum, not exceeding twenty guineas, be given by this society in Michaelmas Term yearly, during the pleasure of the principal and rules, to provide one or more testimonials for such of the candidates as, in passing their examination during the year, for the purpose of being admitted on the roll of attorneys and solicitors, shall, in the opinion of the Examiners, merit distinction; and that the council of the Incorporated Law Society be requested and empowered to apply the before-mentioned sum in the purchase of books for such candidates, or in any other manner they may deem suitable; the said annual gift to be distinguished as 'The Prize of the Honourable Society of Clifford's-inn.'"

NOTICES TO CORRESPONDENTS.

C. D.—You are the best judge of your capacity; it is not the amount of reading, but what is thoroughly digested, which will be serviceable.

LEX.—We believe the society is not now in existence. There was not sufficient support given to it. The lukewarmness of articulated clerks, as a body,

is rather proverbial. It is only a few who show any zeal on behalf of the class, and they soon cool down on experiencing the indifference of their fellow clerks.

M. F.—You can have your name inserted in the List of Correspondents. There is nothing to pay. You cannot have your initials only inserted; no one would choose to correspond with you.

PLUMLEY—ADDRESS.—We shall be obliged if any one can furnish us with the present address of Mr. J. Plumley, late of Bradford, Wilts. He has lately gone away, and left no new address.

S. F. C.—It is a matter which does not concern us, and we would rather not notice it. The profession will, no doubt, deal with it in an effectual manner before long.

LIBRARY.—No. 1 was duly published on the 15th of last month, and a fresh number will appear on the 15th of each month. We hope that our old friends will support this undertaking, as we think it is one likely to be beneficial to them.

ERRATUM.—At p. 52, line 26, for "sec. 20" read "sec. 29."

LOVER OF LAW.—We thank you for calling attention to the misprint, which we have noticed above. Correspondents address their letters to any of the gentlemen whose names are inserted in the Lists. Before so doing you should have your name inserted.

T. F.—We cannot bring out, at present, any of the other works. We may do so when the number of subscribers is very much increased, which we trust will be at a not very distant time.

J. C. S.—We think your complaint as to the LIBRARY not just, as it is obviously impossible that all the works can be brought out at once. Certainly, the other suggestion as to a bi-monthly issue is more reasonable, and we would adopt it if the LIBRARY were to receive such a support as would justify it. It must be recollected, that many articulated clerks would object to double their annual subscription, and we should lose some subscribers by the adoption of the bi-monthly issue, which only a greatly increased list of subscribers would compensate. It is, therefore a matter quite for articulated clerks, who can hardly expect that we should bring out works without a fair prospect of support.

ERRATA IN LIBRARY.—Subscribers taking in the LIBRARY will please make the following alterations: at p. 4, line 20, for "*tying*" insert "*being*;" it will then read "all persons for the time being, *being* in a particular parish." It may be added, that if the custom had been for all "*the inhabitants of the parish*," it would have been good. At p. 32, line 7, for "twenty-five" read "twenty-four;" it will then stand "a person attains his twenty-fifth year when he becomes twenty-four."

The Law Chronicle.

No. 42—Vol. IV.

NOVEMBER 2, 1857.

Price 1s. 8d.

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VENDORS AND PURCHASERS.

CONTRACT OF SALE.—*Offer and acceptance—Contract to be afterwards drawn up.*—Where a person proposing to sell an estate receives an offer, and his estate agent answers "he has authorised us to accept the offer, subject to the terms of a contract being arranged between his solicitor and yourself," the answer does not constitute a complete contract, and the vendor is at liberty to add other terms, and on their non-acceptance to break off the treaty. *Honeyman v. Murryat*, 26 Law Journ. Ch. 619.

INJUNCTION.—*After completion of purchase—Disturbing vendor—Specific performance not asked for.*—When a contract is complete, the money paid, and possession given, the court will prevent the possession being interfered with by the vendor, although the purchaser does not ask for the specific performance of the contract. *Hervey v. Smith*, 22 Beav. 299.

LIS PENDENS [vol. 1, p. 437].—*Not applicable as between co-defendants—Purchase by one defendant from a co-defendant during pendency of suit—Priority of mortgage over lien or unpaid purchase money.*—The doctrine of *lis pendens* does not rest upon implied or constructive notice. The true doctrine of *lis pendens* is, that *pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent. In explanation of the doctrine of *lis pendens* (so important in its effects and yet so little understood), it may be observed that where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only upon the litigant parties, but also upon those who derive title under them by alienations made pending the suit whether such alienees had or had not notice of the pending proceedings. If this were not so there could be no certainty that litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of pending proceedings, would always render a new suit necessary, and so interminable litigations might be the consequence. Some of the earlier authorities show the effects of this doctrine. Thus in *Culpepper v. Aston* (2 Ch. Cas. 115), land had been devised to a trustee to sell for payment of debts. The heir filed his bill against the trustee, alleging that the real estate was not wanted for the debts, and therefore praying a conveyance. It was held that a sale by the trustee *pendente lite* did not bind the heir. So, in *Sorrell v. Carpenter* (2 P. Wms. 482), the plaintiff instituted a suit against one Ligo upon a claim which by the decree he established to certain

leasehold estates. Pending the suit Ligo sold to the defendant. The question was whether the defendant, Carpenter, could sustain his purchase. Lord King was clear that he could not, although upon some formal ground the bill in that case was dismissed. In both these cases the doctrine really was, that pending a litigation a defendant cannot by alienation affect the right of the plaintiff to the property in dispute; and the same principle is applicable against the plaintiff, so as to prevent him from alienating, to the prejudice of the defendant, where, from the nature of the suit, he may have in the result a right against the plaintiff; as in a bill by a devisee to establish a will against an heir, if in the result the devise is declared void, the heir is not to be prejudiced by the alienation of the devisee (the plaintiff) *pendente lite*. (See *Garth v. Ward*, 2 Atk. 174). The language of the court in this case, as well as in *Worsley v. the Earl of Scarborough* (3 Atk. 392), certainly is to the effect that *lis pendens* is implied notice to all the world. But this is not a perfectly accurate mode of stating the doctrine. What ought to be said is (as before stated) that *pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent. These remarks will explain the following decision (on appeal) of the Lord Chancellor and Lords Justices:—In 1827, A., tenant for life, sold his life estate to B., tenant in tail in remainder, in consideration of the payment of certain sums in gross, and of an annuity. Shortly afterwards B. sold the estates to C. in fee, suffering a recovery. In 1828 B. died, leaving D. his heir-at-law, who in 1830 filed a bill against A. and C. to set aside both contracts of sale on the ground of fraud. Pending this suit, and in the year 1833, C. mortgaged a portion of the estate to E. to secure £800. In 1835 a decree was made in the suit dismissing the bill as against A., but setting aside the sale to C. as fraudulent, and directing accounts to be taken; and upon payment of what should be found due from D. to C., C. should convey free from incumbrances. Subsequently A. filed his bill for specific performance against D., C., and C.'s incumbrancers, the consideration money for the purchase not having been paid. The question now was as to the right of priority between A. for unpaid purchase money, and E., the mortgagee of 1833, for his mortgage money. Sir W. P. Wood, V. C., decided that the doctrine of *lis pendens* applied, and that A. was entitled to priority: Held, reversing that decision, that the doctrine of *lis pendens* does not apply as between co-defendants, unless, indeed, for the purposes of the plaintiff, it is necessary to adjudicate between the co-defendants. *Bellamy v. Sabine*, 3 Jur. N. S. 943.

BIRMINGHAM LAW PROFESSORSHIP.

Our readers may remember, that for many years there was appended to the reports which we inserted in our publication of the discussions of the Birmingham Law Students' Society, the name of Mr. G. J. Johnson, hon. sec.; and those who have read those reports will, we are certain, not be surprised that the compiler of them has attained the position of Professor of Law in the Queen's College, in Birmingham. We congratulate, not only that gentleman on the honourable position he has attained, but also the articulated clerks of that town for the opportunity now afforded them of studying under such superintendence. We trust that the expectations formed from this appointment, expressed in the following terms, will not be disappointed:—"We have pleasure in stating, that at a meeting of the Council of Queen's College, held on Wednesday last, the Warden, the Rev. Chancellor Law, in the chair, Mr. George James Johnson, of the firm of Tyndall, Son, and Johnson, was unanimously elected to fill the Professorship of Law, vacant by the resignation of Mr. C. R. Kennedy. Mr. Johnson was elected on the recommendation of the Law Society, and a very handsome testimonial in his favour was also presented by a large number of solicitors who had formerly been members of the Law Students' Society, with which Mr. Johnson was for a considerable time intimately connected. From the latter document we extract the following passage:—"The Department of Law in your college, in the hands of a competent professor, is calculated to obviate to a great extent an acknowledged deficiency in legal education; and as Mr. Johnson is fully alive to this deficiency, and the causes occasioning the same, we do not doubt but that the department would in his hands become what its founders intended it to be—a school for sound and practical legal education." Bearing in mind that the law department is intended to facilitate the professional training of attorneys and solicitors, we are glad to find that the Council have appointed a member of that branch of the profession to fill the vacant chair, because an attorney must necessarily have a more accurate knowledge of the wants of his professional brethren than could be possessed by a barrister. We trust that Mr. Johnson will be able to raise the Department of Law to a level with the Medical and Surgical Departments, and we have no doubt that, if he is properly supported by the solicitors of the town and district, this desirable result will be attained."

We hope before long to be able to notice Professor Johnson's lectures, which must have a great interest for both solicitors and articulated clerks; and we may add, that we trust his example will not be thrown

away on others who may have similar opportunities offered to them. This is the best way in which to elevate the profession in general estimation.

THE MONTH'S SUMMARY.

Growth of county court jurisdiction.—Scarcely a session has passed since the county courts were established without the addition of some branch of jurisdiction to the county courts; and, indeed, so great has this been, that it is difficult for the practitioner to bear in mind the various subject-matters brought within the control of those courts. The following concise statement of the additions to the primary jurisdiction will be both interesting and useful. Under the 10 & 11 Vic. c. 102, the judges of the county courts have jurisdiction to hear the petitions of insolvent prisoners confined in country districts, and the petitions of those who apply for relief under the Protection from Process Acts; and also cases arising against judgment debtors, under 8 & 9 Vic. c. 127. By the Absconding Debtors Arrest Act, 1851 (14 & 15 Vic. c. 52), they are enabled to arrest such debtors till a *capias ad respondendum* can be obtained, in due course, from a judge of the superior courts. The Industrial and Provident Societies Act, 1852 (15 & 16 Vic. c. 31), conferred upon them power to adjust disputes between such societies and their members; and by the Succession Duties Act, 1853 (16 & 17 Vic. c. 51), a similar authority was given them in disputed assessments under that statute. The same year laid on them duties under the Customs Act (16 & 17 Vic. c. 107), and as to Charitable Trusts (16 & 17 Vic. c. 137). In the year following they were visited with the Merchant Shipping Act (17 & 18 Vic. c. 104), the Literary and Scientific Institutions Act (17 & 18 Vic. c. 112), and the second Common Law Procedure Act (17 & 18 Vic. c. 125). In 1855 the execution of judgments of the Stannary Courts below £50 was intrusted to them by 18 & 19 Vic. c. 32; and also the settlement of disputes occasioned by the Nuisances Removal Act for England (18 & 19 Vic. c. 121), and by the Metropolitan Building Act (18 & 19 Vic. c. 122) of the same year. Last year they got off cheaply, being only saddled with the winding up in certain cases of joint-stock companies (19 & 20 Vic. c. 47); being authorised to use the machinery of the summary procedure on bills of exchange and promissory notes in cases where the amount due falls within the limit of their £50 jurisdiction (19 & 20 Vic. c. 108, s. 4; Order in Council, 30th of January, 1856); and being enabled to receive acknowledgments from married women (19 & 20 Vic. c. 108, s. 78). In the session

which has just concluded, their services will now be also required to carry out the new scheme for proving wills and administering the estates of intestates; it being enacted by the 54th section of the act "To amend the Law relating to Probates and Letters of Administration in England" (20 & 21 Vic. c. 77), that where a testator or intestate had, at the time of death, his fixed abode in one of the districts specified in the schedule to the act, and his personal estate, in respect of which probate or letters of administration are to be granted (exclusive of what he had as trustee, and not beneficially, but without his debts), is under £200, or his real estate (if any) is under £300, the judge of the county court for the place where such abode shall be, shall have the contentious jurisdiction and authority of the "Court of Probate," established by the act in respect of questions as to the grant and revocation of probate or letters, in case there be any contention in relation thereto.

Statutes—Repeal by subsequent—Cumulative penalties—Negative words.—The law as to the repeal of statutes is well laid down thus, in Darrison's Statutes (p. 532), "It is a general rule that subsequent statutes, which had accumulative penalties, and institute new methods of proceeding, do not repeal former penalties and methods of proceeding ordained by preceding statutes, without negative words." That is a canon on the construction of statutes (per Watson, B., 3 Jur. N. S. 940). To this Martin, B., adds, "When I find two affirmative acts on the same subject, but an addition made in the latest, I read the two together; and it seems to me that the addition provided by the second act here having provided that the adjudication is to be in a particular way, an adjudication under the former act is no longer valid" (Exp. Baker, 3 Jur. N. S. 940, 941).

Patent—Notice of objections too general—Better particulars [vol. 3, p. 159].—In the case of Hall v. Dolland (1 H. and Norm. 134; 3 Law Chron. 159), the Court of Exchequer held, that where the objection to a patent is too general, the course of the plaintiff is to go before a judge to require a better particular; but if the notice comprehends the objection, it cannot be excepted to at the trial on account of its generality.

NOTICES TO CORRESPONDENTS.

THE EXAMINATIONS.—We have fully noticed the subject of the proposed examination in classics, &c., and as we have no doubt that it will not affect clerks already articulated (and the objections of our correspondents seem to be confined to that), we have

thought it better not to publish the communications received from many quarters. We trust this general notice will be accepted by our correspondents, and that they will acquiesce in our decision.

LEX (Manchester).—We cannot promise to bring out the other works at present. You are not aware of the difficulty experienced in pleasing so many parties.

S.—You will not be in time for Hilary. Give notice for Easter Term.

S. B.—The new edition of "Stephen" is promised for the beginning of the present month. We cannot say anything more precise.

L. S.—We know nothing of the society referred to, and suspect it has long ceased to exist.

F. R. C.—The word "addition" is more technically correct than "description;" and, therefore, the statements at p. 4 are correct. We are obliged for other erratum, which we have noticed, and shall be glad to receive any others. We have no covers for the Chronicle.

LOVER OF LAW.—The references "Jur. N. S." are to the *Jurist*, New Series.

W. M. S.—We do not think the party referred to could obtain a salary, but it is possible he might obtain his articles without premium if he could get a good recommendation for industry. He should try the effect of two or three advertisements.

ERRATUM IN LIBRARY.—Subscribers taking in the "Library" will please make (in addition to those noticed *ante*, p. xvi) the following alteration: p. 50, line 1, strike out the word "has," which is superfluous, the word "enjoys," at p. 49, last line, being sufficient.

LIST OF CORRESPONDENTS.

The following are the only additional names to the lists published *ante*, pp. x, xiv—namely, Mr. T. H. Alderton, Messrs. Bicknell, 79, Connaught-terrace, Edgware-road, London; Mr. J. Brough, J. E. Hinds, Esq., solicitor, Stafford; Mr. Thompson Cooper, Jesus-lane, Cambridge; Mr. W. H. Fellows, Hoseley-house, Tipton, Staffordshire; Mr. John Heelis, Barnard Castle, Durham; Mr. H. Michelmore, T. W. Gray's, Esq., solicitor, Exeter; Mr. G. R. Rogerson, Messrs. Rogerson and Peacock's, solicitors, No. 4, Chapel-street, Liverpool; Mr. H. Whiteford, Messrs. Whiteford and Bennett's, solicitors, Courtenay-street, Plymouth, Devon.

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In several of the Titles many, and in some cases all, of the Forms have been redrawn to accord with changes of the Law, and in other Titles additional Forms have been inserted.

In the Title "Stamps" additional distinctness has been given to the heading of each subject of charge.

In Part 2, the Rules have been carefully looked through and several new Rules given; and in Part 3, a Rule for Calculating the Value of an Annuity until two of three named lives fail has been added.

In the TABLES, one has been added which will be found of much utility, as from it, in a simple manner, the price of Corn in shillings and pence per quarter, as compared with that in francs per hectolitre, can be readily ascertained.

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ANSWERS TO MOOT POINTS.

No. 149.—*Benefit Societies—Alteration of Allowance* (vol. 3, p. xxxvi).

These societies are regulated by 13 & 14 Vic. c. 115, whereby they are empowered to make rules, some of which may very probably provide for the case in question.

It is improbable that the weekly payment to A. has been reduced without sufficient grounds arising from the state of the funds of the society, if it be not in accordance with some regulation of the society, providing for a reduction after payment for a certain length of time, which is very usual. By section 15, an annual account is required to be made up, and each member is entitled to a copy on payment of sixpence.

A. should, therefore, obtain a copy of the rules and account, and if the rules do not provide for a settlement of the dispute, I apprehend that it can be determined in the county court under section 22.

L. C., jun.

No. 155.—*Maintenance of Grandfather* (vol. 3, p. xxxix).

Although a grandfather is compellable to maintain his grandson, the latter is in no case compellable to maintain the former (Steph. Com., vol. 3, p. 165).

P. R. J.

No. 156.—*Tender in Copper* (vol. 3, p. xxxix).

I think differently from the mooter; for the meaning of the statute referred to appears to be that debts must, as a general rule, be paid in gold, but that, for convenience sake, those not exceeding 40s. may be paid in silver instead. Copper may only be tendered where the debt is so small that it cannot be paid in silver (Steph. Com., vol. 3, p. 165).

P. R. J.

No. 167.—*Will—Moneys due to Testator* (vol. 3, p. xlii).

I am unable to cite any authority directly applying to this point; yet, since the moneys secured on the mortgage and promissory notes were "due at the time of testator's decease," I have no doubt that under the bequest they will pass as well as any other debts. There may be some doubt whether the legal estate in the mortgaged property will pass. If that were the point, I should express my opinion in the affirmative, for we find, in *Silberschilt v. Schiott* (3 Ves. & B. 49), Sir Wm. Grant remarking, that "there is no doubt a gift of the money would have carried his (testator's) interest in the land upon which it is secured." If the legal estate does not pass, the securities will pass, along with the moneys, to the legatee as against the heir at law, to whom in such a case the legal estate will pass.

T. H.

No. 15.—*Ringling, &c., Church Bells* (ante, p. 146).

In answer to your correspondent, W. H. S., on the

above point, I beg to refer him to Burn's Ecclesiastical Law, where, under the heading "Bells" (vol. 1, pp. 134, 135), he will find the required information. The article commences by quoting Can. 88, to the following effect:—"The churchwardens or questmen, and their assistants, shall not suffer the bells to be rung superstitiously, upon holidays or eves abrogated by the Book of Common Prayer, nor at any other times, without good cause, to be allowed by the minister of the place, and by themselves."

Now, from this alone we see that the churchwardens, even with "good cause," must consult the minister before acting. They have, it is true, on certain occasions, such as burials, &c., undoubted right to exercise their authority, but in all other cases the incumbent's authority must first be obtained.

Burn further observes, that "although the churchwardens may concur in directing the ringing or tolling of the bells on certain public and private occasions, the incumbent, nevertheless, has so far the control over the bells of the church, that he may prevent the churchwardens from ringing or tolling them at undue hours, and without just cause. Indeed, as the freehold of the church is vested in the incumbent, there is no doubt that he has a right to the custody of the keys of the church, subject to the granting admission to the churchwardens, for purposes connected with the due execution of their office. Proceedings may be instituted in the Ecclesiastical Court against churchwardens who have violently and illegally persisted in ringing the bells without consent of the incumbent."

Therefore, when churchwardens have, in the course of their general duty, to enter the church, and cause the bells to be rung, we may infer that they need not ask the consent of the minister further than by asking him, or his deputy, for the key.

As to the right of the incumbent to the custody of the key, Sir John Nicholl, in *Lee v. Matthews* (3 Hagg. 173), held, that "the minister has, in the first instance, the right to the possession of the key, and the churchwardens have only the custody of the church under him. If the minister refuses access to the church on fitting occasions, he will be set right on application and complaint to higher authorities."

Wherefore, I am of opinion that the minister has the right to the custody of the key, and may order the bell to be rung or not, provided it be on occasions when the ringing is optional, and not commanded by law. The churchwardens have clearly no authority in the matter of ringing bells (except on certain occasions) without the consent of the minister.

P. L. H.

No. 15.—*Ringling, &c., Church Bells* (ante, p. 146).

The control of the bells is vested in the rector and churchwardens jointly.

By the 88th canon, it is declared that "the churchwardens or questmen and their assistants shall not suffer the bells to be rung superstitiously upon holidays or eves abrogated by the book of common prayer, nor at any other times, without good cause to be allowed by the minister of the place, and by themselves."

This would seem to make a joint consent necessary, but the law on the subject is fully set out in 1 Burn's Eccl. Law, p. 134, 9th ed., as follows:—"Although the churchwardens may concur in directing the ringing or tolling of the bells on certain public and private occasions, the incumbent nevertheless has so far the control over the bells of the church, that he may prevent the churchwardens from ringing or tolling them at undue hours and without just cause. Indeed as the freehold of the church is vested in the incumbent, there is no doubt that he has a right to the custody of the keys of the church subject to the grant of admission to the churchwardens for purposes connected with the due execution of their office. Proceedings may be instituted in the ecclesiastical court against churchwardens who have violently and illegally persisted in ringing the bells without consent of the incumbent."

L. C., jun.

No. 16.—*Landlord and Tenant*—Stamp on Letting (ante, p. 146).

Archbold, in his law of Landlord and Tenant (p. 62), says: "That an agreement for a lease, if under seal, must have a £1 15s. stamp as an instrument not otherwise charged. But 'an instrument whereby a landlord agrees to let and a tenant agrees to take' is a lease (see *Tarte v. Darby et al.*, 15 Law J. 326, Ex.; and Archbold's Landlord and Tenant, p. 21), and must, consequently, have a lease stamp as being a deed, but then it must be under seal if it come within 8 & 9 Vic. c. 106, s. 3, which requires leases required by law to be in writing to be under seal; but although this lease need not have been in writing, I am inclined to think that being in writing, and being a lease, it ought to be under seal, and have an *ad valorem* lease stamp.

L. C., jun.

No. 16.—*Landlord and Tenant*—Stamp on Letting (ante, p. 146).

This instrument should be stamped with the *ad valorem* duty as a lease. All agreements for letting property at an annual rent must be so stamped; the common agreement stamp of 2s. 6d. has no effect whatever in such cases. W. M. S.

No. 17.—*Mortgage—Sale—Application of Money* (ante, p. 146).

A mortgage debt is an entire obligation for the fulfilment of which every part of the land mortgaged is a security, and the mortgagee or his representa-

tives may, in exercise of their power of sale, resort to any part of the land they choose, and as soon as the choice is made the remaining part of the land is exonerated from the whole or part of the debt according to the amount of the sale moneys, and this exoneration does not, in any manner, depend on the application the mortgagee chooses to make of the sale moneys, but upon the principle, that when any part of the security is realised, the proceeds must go in immediate payment of part or the whole of the thing secured in exoneration of the remainder of the security. This right of exoneration E. would clearly be able to insist upon, were the original mortgage to B. the only real incumbrance. Nor is the position of parties altered by the fact of there being a second mortgage of C.'s part of the land, particularly as it is made to B. himself. A second mortgage is subject in every respect to the prior one, and must abide its discharge. I am decidedly of opinion (with the mooter) that the whole of the purchase money must be applied in payment of the first mortgage affecting the whole estate, and that that part which belongs to D. will thenceforth be wholly exonerated from all claims in respect thereof. I write this answer in haste, which will account for my citing no cases.

A. L. TROTMAN.

No. 17.—*Mortgage—Sale—Application of Money* (ante, p. 146).

I assume from the case stated that C. and D. are tenants in common of the estate, and that A. died after the 1st January, 1855, so as to bring the estate within the provisions of the act 17 & 18 Vic. c. 113, s. 1.

I am clearly of opinion that "P. has a further claim on D.'s part of the premises," and I draw my conclusions from the following premises:—

In case of an estate descending *cum onere* to tenants in common, equity would apportion the incumbrances; thus, the undivided moieties of C. and D. are each respectively liable to £150.

A mortgagee, selling under his power of sale, is bound to convey free from prior mortgages (unless it be expressly stipulated to the contrary, which does not appear to have been the case here), and in this case, a purchaser seeing to the application of his purchase money, could only require the moiety of C. to be exonerated from the charge of £150, which is the total amount that is equitably charged on it, and B. would therefore, have to come on the other moiety for the residue of his first charge of £300.

If it be argued that B. can raise the whole of his first debt (charged upon the whole) out of C.'s moiety, the same rule (if established) would give him the power of satisfying the whole out of D.'s moiety.

If the estate be actually apportioned between C. and D., I think there can be not the slightest doubt that each part would be liable for one-half the original debt only.

Take the case (which is somewhat similar) of one, being the first mortgagee of two estates, and one of them is afterwards further mortgaged to a second

mortgagee. There the first mortgagee is compelled to resort first to that estate which is not subject to the second mortgagee's incumbrance, lest, by the first mortgagee exhausting the estate comprised in the second mortgage, the second mortgagee should be left without any security (see Coote on Mortgages, p. 507).

I conceive that the same principle would apply here, and that, consequently, D.'s moiety is liable to the mortgagee to the extent of £150.

If A. died before 1st January, 1855 (unless it were otherwise directed by the will), C. and D. would be entitled (and, consequently, B. would benefit by it) to have the mortgage debt of the testator discharged out of his personal estate.

B. would therefore, in that case, appear to have acted rightly in selling C.'s moiety to satisfy his second mortgage, and would then call upon A.'s executors for the first £300. L. C., Jun.

No. 17.—*Mortgage—Sale—Application of Money* (ante, p. 146).

I think the purchase-money arising from the sale of C.'s share must be applied in payment of the whole of the first mortgage debt.

A. mortgaged the premises to B., and then divided the same by his will, subject to the mortgage between C. and D. Under this devise, C. and D. would take each of them his share in severalty in the equitable estate, the legal estate being vested solely in B.; but they would hold jointly as against B.'s mortgage—that is, their lands would be subject to the mortgage in the same manner as if they were held by one person solely. C. further charges his share—that is, he executes a charge upon his share in the equity of redemption in the entirety. B., in exercise of a power, sells C.'s share. The first mortgage, being a prior charge upon the whole and every part of the premises devised to C. and D., must then be first discharged, and such discharge will exonerate the whole of the same premises.

If B. out of the proceeds arising from the sale of C.'s share has been paid his first mortgage debt, interest, &c., he has certainly no claim on D.'s share, for D.'s share is only liable to the first mortgage, and when that is discharged the liability ceases. But B. may, if he pleases, first sell D.'s share in discharge of the first mortgage, and then sell C.'s in order to pay himself the second mortgage debt.

If C.'s share is sold, and the first mortgage debt thereby paid, C. has a right in equity to call upon D. for an account, and compel him to pay a proportionate part of the mortgage debt, and *vice versa*.

T. H.

NOTICES TO CORRESPONDENTS.

LOVER OF LAW.—We will, as you suggest, mention, when we know, the prices of the books noticed.

W. F. S.—We feel no doubt that the service is good, the attendance at C.'s office being with the consent of B., and for the benefit of A.

AN ARTICLED CLERK.—An articulated clerk cannot be examined before the termination of his articles, except where the articles terminate in the same

term. There is no doubt that a bachelor of arts serving for three years can be admitted, though he has taken a master's degree prior to the application to be admitted.

H. W.—The procuration charge is 5s. per centum. There is now no statute regulating this. There was a statute allowing 5s. per cent. on such transactions, but this is now repealed (1 Law Chron. 150).

G. C.—We cannot, at present, issue the "Library" more frequently. It would be impossible to bring out a number of each work simultaneously. We doubt if our subscribers generally would approve of any change.

A. B. C.—You should read more each day, and discuss the matters with any one willing to do so. Diligence is the only remedy.

LEX (Birmingham).—We cannot make any alteration. If, indeed, there was an overwhelming necessity, it would be different; but most of our subscribers are satisfied.

M. O. S.—We have not heard of any further volume by Mr. Williams. The one published before is complete of itself.

LEX.—The only work which we know of, embracing all the matters referred to, is Mr. Ward's Treatise on Investments, 2nd edit.; Simpkin and Marshall. It is written by a solicitor, but contains practical information upon investments, including railway, turnpikes, mines, the funds, building societies, &c. You will certainly find it worth the money.

W. R. W.—You would be required to answer many more questions in Equity and Common Law. Your proficiency in the Conveyancing might somewhat mollify the examiners with respect to the other branches, but would not supersede the necessity for answering, at least, one-half of the Equity and Common Law Questions correctly.

T. L. B.—We know of no later edition than that mentioned by you.

P. S. O.—We are sorry your communication has been hitherto overlooked. We will notice it in next Number.

E.—We wish we could obtain a copy of the answers by a candidate; some years ago we tried both the examiners and the candidates, but could not succeed. We think it would be exceedingly useful and interesting, but it is certain that the examiners will not give leave, and the candidates, after they have passed, no longer feel such an interest as to induce them to take the trouble to furnish copies of their answers.

LISTS OF CORRESPONDENTS.—The following are the only additional names to the lists published ante, pp. 10, 14, and 20, namely:—Mr. Thomas Horwood, of Aylesbury; Mr. H. Nunneley, of Boston; Mr. W. F. Sykes, Carlisle; Mr. E. A. Ward; S. P. Brookes, Esq., solicitor, Tewkesbury; Mr. H. Whiteford, Courtenay-street, Plymouth.

The christian name of Mr. Brough is not correctly stated ante, p. 20, it should be altered to Mr. "T. L." Brough.

The Law Chronicle.

No. 44—Vol. IV.

JANUARY 1, 1858.

Price 1s. 8d.

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MUTUAL CORRESPONDING SOCIETY.

We have received the following from Mr. Walker, but at so late a period (Dec. 30) as to preclude our saying anything on the subject; but we should think the matter speaks for itself:—

"It is now definitely arranged that this meeting will be held at Anderton's Hotel, Fleet-street, London, on Thursday, Jan. 21, 1858. Dinner will be on the table punctually at six o'clock. Arrangements have been made by which any gentleman may stay all night at the hotel, if he choose to do so.

"As the objects of the meeting (regarding it in a business light) are twofold—viz., to receive and discuss suggestions for the improvement of the working of the Society and, secondly, to discuss those questions which are now interesting us, as law students—it is proposed to bring the discussion to a conclusion on the first subject, before commencing the second, which will be opened by the reading of an essay by Mr. R. M. Pankhurst, B.A., of Manchester, 'On the Education of Articled Clerks before and during Articles,' introducing a discussion on that subject, and the Examination question; the subject of the prizes and division lists at the examinations, &c.

"Any gentleman wishing to move a resolution, must give notice to me, prior to the day of meeting, of his intention to do so—at the same time, forwarding a copy of such reso-

lution. Those gentlemen who give such notice, will be entitled to priority over those who fail to do so.

"The tickets for the dinner are 10s. 6d. each (including wine and dessert), and can be obtained from me on receipt of a post-office order for that amount. There will be no extras, except for waiters, for whose benefit a plate will be sent round after dinner. If any gentleman intending to be present, has not yet applied to me for a ticket, I shall feel glad if he will do so at once, as it will materially facilitate our arrangements.

"I shall be very happy to give any gentleman any further information upon the subject.

"ISAAC WALKER,

"Provisional Hon. Sec.

"Burslem, Staffordshire."

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Now Ready, price 25s., 2 vols. cloth, The Fourth Edition of the **KEY TO THE EXAMINATION QUESTIONS**: Embracing the Questions put at the Examination of Articled Clerks from the Earliest Period to the Present Time: Together with Full Answers thereto, and copious References to Cases and Authorities. In addition to giving the Articled Clerk the best idea of the Examination he will have to pass through, this Work forms a most comprehensive elementary treatise on the various branches of the law in consequence of the fulness and completeness with which the Answers have been given.

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DEBATING SOCIETIES.

THE BIRMINGHAM LAW STUDENTS' SOCIETY.

December 9, 1857.—Moot Point, No. 237.

Is a carrier of passengers liable as a common carrier of persons, by the custom of the realm?

In order to get a clear insight into this question, I propose, in the first place, to consider the extent of liability to which common carriers of goods are exposed; and then, in the second place, to consider the responsibility of a carrier of passengers, according to the moot point.

1. As to the liability of a common carrier of goods. At the common law, a common carrier stands in the situation of an insurer of the property intrusted to him; and he is answerable for every loss or damage happening to it whilst in his custody, no matter by what cause occasioned, unless by the act of God, or that of the Queen's enemies: they are, therefore, responsible for the abstraction of the property by robbers—and notwithstanding they are not personally, or, by their servants, guilty, of any negligence whatsoever, for the case is not within the exception of the act of God, or of the Queen's enemies. This common law liability being found to press with very great severity upon carriers, they soon found it necessary for their protection to make special contracts in all cases where goods of more than ordinary value were delivered to their care; and, considering the enormous increase of late in the goods traffic, such an attempt to restrict their liability we must regard as both reasonable and just. Well, they distributed notices, advertised and posted them on the walls of their buildings, and otherwise gave notice to the public of the terms upon which they intended the carriage of goods; but unless this notice was brought to the immediate knowledge of the consignor, no special contract arose, and thus the common law liability continued. Very well, this of course was so in many instances of great importance, until the Legislature thought fit to interpose; and now, by the 11 Geo. 4 and 1 Will. 4, c. 68, the common law liability is restricted to the carriage of all goods under the value of £10, with few exceptions; and where the various articles therein enumerated exceed this amount, the value and nature of such articles must be declared by the consignor, and an additional charge is payable as a premium thereon; and unless these conditions are complied with, the loss is at the risk of the sender.

It is now proposed to consider the liabilities of carriers in respect of passengers; and here, I should say, that, with regard to their luggage, the doctrine seems now to be firmly settled that they are liable upon the ordinary footing of common carriers (see *Robinson v. Dunmere*, 2 Bos. and Pul. 416; *Clark v.*

Gray, 6 East, 564; 4 Esp. 177; *Brooke v. Pickwick*, 4 Bing. 218). With regard, however, to the persons of passengers, the carriers of passengers are not like carriers of goods, insurers against all injuries, except of the act of God, or by public enemies, and their undertaking is not an undertaking absolutely to convey safely. The rule appears to be that passenger carriers are required to carry safely those whom they take into their charge, as far as human care and foresight will go; consequently they are liable for the result of any accident which may arise through negligence, and numerous cases establish their non-liability as common carriers according to the custom of England (see *Aston v. Heaven*, 2 Esp. N. P. C. 533; *Christie v. Grigga*, 2 Camp. 79. *Bremner v. Williams*, 1 C. and P. 414; *Sharp v. Grey*, 9 Bing. 457; *Grote v. Chester and Holyhead Railway Company*, 2 Ex. 251; *Curtis v. Drinkwater*, 2 B. and A. 169; *Jones v. Boyce*, 1 Stark. R. 493; *Great Northern Railway Company v. Harrison*, 4 Week. Rep. 626, Ex.; *Carpue v. London and Brighton Railway Company*, 5 Q. B. 747; 3 Rail. C. 692; *Bretherton v. Wood*, 3 Bro. and B. 54). These cases are all in the negative, and I have been totally unable to find one single case supporting the affirmative of the moot point. As I have already, I fear, taken up too much of your space on this subject, I will omit the arguments of the members, and just say, that, to attempt to impose on carriers of passengers a similar liability to that of carriers of goods, would be to work the harshest and the most oppressive injustice. Their true liability is measured by the amount of carelessness or negligence committed by them: beyond this their liability does not extend; and, therefore, passengers will do well in all cases to insure their lives, as a considerable number of accidents spring from unforeseen causes; and I should also say that Sir William Jones, in his work on Bailments, points out, as the reason for the distinction between the two cases, that a carrier of goods is strictly a bailee, and that a carrier of passengers is not.

A. FREEDAY, Corresponding Secretary.

County court—Jurisdiction—Judgment summons—Discharge by Insolvent Court—Prohibition.—As more stated, *ante*, p. 127, the jurisdiction of a judge of a county court to commit a defendant to prison by warrant upon a judgment summons, issued under the 9 & 10 Vic. c. 95, s. 99, is at an end after the defendant has obtained a valid order of discharge under the Insolvent Debtors Act, upon a petition, the schedule to which contains the judgment debt (*Copeman v. Rose*, 26 Law Journ. Q. B. 251).

APPEALS FROM JUSTICES OF THE PEACE

(ante, pp. 142—144).

Appeals to Superior Courts of Common Law under the 20 & 21 Vic. c. 43.

REGULA GENERALIS.—*Michaelmas Term, 1857.*

1. It is ordered, that in cases of appeal to a superior court under the provisions of the stat. 20 & 21 Vic. c. 43, the 15th and 16th Practice Rules of Hilary Term, 1853, so far as the same are applicable, shall be observed.

2. And in cases when the appeal is to be heard before a judge at chambers, the appellant shall obtain an appointment for such hearing, and shall forthwith give notice thereof to the respondent, and shall, four clear days before the day appointed for the hearing, deliver at the judge's chambers a copy of the appeal.

The statute with reference to which the above rule is framed gives an appeal on points of law from the decision of justices upon any information or complaint made before them. The 15th and 16th Practice Rules of Hilary Term, 1853, are to the effect, that appeals may be set down for argument in the special paper, at the request of either party, four clear days before the day of argument, notice thereof being given forthwith to the opposite party, and the appeal cases, with points for argument, being delivered to the judges.

BILLS OF COSTS IN ACTIONS UNDER £20.

In the *Common Pleas*, when allocaturs on judgments by default in actions under £20 are required, it is requested that the bills of costs be made out in the following manner:—

<i>Town.</i>		£	s.	d.
Costs of judgment		2	14	0
Attending judge for order and paid.....		0	5	4
Attending master and paid		0	5	4
Further bill of costs		0	2	0
<i>Country.</i>		£3	6	8
Costs of judgment		3	2	0
Attending judge for order and paid.....		0	5	4
Attending master for allocatur and paid ...		0	5	4
Further bill of costs		0	2	0
		£3	14	8

In the *Exchequer of Pleas*, in cases of judgment for want of appearance in actions under £20, where the judge certifies for costs, it is requested that bills be brought to the office in the following form:—

<i>Town.</i>	£	s.	d.
Usual costs	2	14	0
Attending the judge and paid for order ...	0	5	4
Bill of costs.....	0	2	0
Attending to tax.....	0	3	4
Paid taxing	0	2	0
<i>Country.</i>			
Usual costs	3	2	0
Attending the judge and paid for order ...	0	5	4
Bill of cost	0	2	0
Attending to tax.....	0	3	4
Paid taxing	0	2	0
£3 14 8			

The amount allowed for costs in the Queen's Bench is, we understand, nearly the same.

In the *Queen's Bench*, when costs have been taxed by the masters upon a judgment by default, the judgment paper must be given to the clerk in the taxing office, for the purpose of having the costs entered after the masters have marked the allocaturs.

All parties applying for appointments on references to the masters under the Common Law Procedure Act, 1854, must apply to the clerk in the taxing office for such purpose.

NOTICES TO CORRESPONDENTS.

A. B.—The questions at the examination are not *viva voce*, but by printed papers.

J. B. E.—We are satisfied that the examiners would not allow any answers to be published. Indeed, if they had the power, they would prevent our publishing the answers we do. It would be a very good thing if any articulated clerk would favour us with a copy of his answers; but though we have before requested this as a favour, we have never been able to prevail on any candidate to take the necessary trouble.

* * It is both useful and necessary for an articulated clerk to read books of practice, but not such complete works as Archbold. Your distinction is very just between a book of practice to be read and one to be referred to. Our "Library" practices of common law and equity will steer clear of too much baldness and too great minuteness.

EXAMINATION QUESTIONS AND ANSWERS.—We have received two suggestions respecting the publication of these: one wishing each answer to follow its question, instead of their being placed separately; but this, we know from experience, would be objectionable to most of our readers; the other suggestion is to postpone to a subsequent Number the publication of the answers. This we cannot do; neither

do we perceive the advantage of so doing, as any clerk is at perfect liberty not to read the answers till he has tried to answer the questions—a plan we have frequently recommended, and which we consider clerks are more likely to carry out, knowing that they can immediately compare each answer. Therefore, to the last proposal, we venture a decided negative: respecting the former, we are willing to hear the opinions of our subscribers, as it is quite a question for them.

THE LIBRARY.—We shall take an early opportunity of noticing this work, the first volume of which will soon be completed. At present, we may mention that we have determined to *accelerate* the completion of the whole series, by bringing out a *double* number each month, i. e., eighty pages, instead of forty, the price of which will be 2s. This will enable us to bring out all the proposed works in less than *three* years.

L.—It is impossible for you to do more at present in the way of reading, but the chief thing is to be satisfied that you understand what you read. There is nothing like discussion with an intelligent companion, even though he has not read much. You ought to have seen more practice, and we decidedly advise your removal into a town office. The agent ought not to require any premium.

A. X.—We have not seen the work referred to. It appears to us, from what you state, that there is a mistake, and that the limitation is good as a remainder.

LXX.—A fresh edition of the Key is not likely to be issued for some time; the fourth edition brings down the questions and answers so as to include the present practice, and the abrogated practice is not even mentioned, so that there is no misleading the student. There is a fourth edition of Addison, but the third will do nearly as well.

T. N.—You should join the Debating Society to get the full benefit. Correspondence is useful, but discussion is better. A useful book might be produced with subjects and hints for treatment and discussion, and we have long thought so, but are afraid it would not receive sufficient support. We cannot know so much as we do of articulated clerks, and their indifference to what is for their benefit, if it costs a trifle, or requires any exertion on their part.

SUBSCRIPTIONS.

The subscription for vol. i. (Nos. 1—13) was £1 2s.; for vol. ii. (Nos. 14—25) £1 2s.; for vol. iii. (Nos. 26—37) also £1 2s. The subscription for the current volume is £1 if prepaid; if not prepaid, it will, as in the case of vols. i., ii., and iii., be £1 2s. We

should prefer *prepayment* of subscriptions; and, as it is an advantage to our subscribers, we trust they will for the future adopt the prepayment plan. Post-office Orders should be made payable at the STRAND Post-office, to our publisher, Mr. THOMAS DAY, of No. 13, Carey-street, London, W.C.

ARREARS OF SUBSCRIPTIONS.

We are sorry to say that many of our subscribers are bad paymasters, and abuse our good nature to an extent beyond further endurance. Through our remissness in not requiring payment, we have not only a very large sum of money remaining due, but we have actually incurred great losses from various parties who have died, left the kingdom, or have simply, according to the post-office indorsement on our applications, "gone away, not known where." The amount thus lost to us forms a very serious item, and greatly curtails our profits; and when we consider how very large an amount of arrears remains unpaid by those who are to be presumed as intending to pay at some time, we cannot but consider it as only prudent on our part to require that such arrears should be *forthwith paid up*. We are sure, if subscribers would consider for a moment only the relative position of ourselves and each of them, they would make every exertion to discharge all arrears. To us, the amount is a burthen of several hundreds (we might even say thousands) of pounds; to each subscriber, it is a question of £3 or £5 at the utmost. Can it be reasonable to put so great a burthen (to say nothing of the unavoidable risk) on us, when a small exertion on the part of each subscriber would suffice to make things comfortable. Indeed, were it not for the kindness of some of our subscribers in *prepaying*, with great promptitude, we should be compelled to give up the system of subscription altogether. This is really so important—we may say so *vital*—a point, that we have determined to require *all arrears to be discharged up to the end of Vol. III.—that is, to June, 1857*; and, unless this is done *forthwith*, we shall be compelled to make direct applications for the payment—which, however, we should rather be spared the necessity of doing. In addition to this, we shall require, as formerly, the kind assistance of some of our subscribers in tracing out *missing* subscribers and those who have forgotten to leave information of their new addresses. We shall have a list for the next Number of those whom we are anxious to discover. In the meantime, we hope to find the arrears have greatly diminished, if not entirely disappeared—which would be a great satisfaction and relief to us.

Printed and published by THOMAS F. A. DAY, at his residence, No. 13, Carey-street, Lincoln's Inn-fields, in the parish of St. Clement Danes, in the county of Middlesex. — Friday, January 1, 1858.

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notes to very many of the sections, noticing the changes made by
statutes, and in some cases stating recent decisions of importance,
and, in the last place, by furnishing a most complete series of
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MOOT POINTS.

No. 27.—*Courts of Record.*

In Stephen's Commentaries it is said, that "the very erection of a new jurisdiction with power of fine or imprisonment makes it instantly a court of record." Now the Court of Chancery is continually exercising this authority, and yet the same author says that the equity side of the court is *not of record*; and the reason he gives is, that it has not been ranked as such from time immemorial, or expressly made such by act of Parliament. I wish, therefore, to be informed whether the equity side of the Court of Chancery is or is not of record? (Steph. Com. vol. 3, pp. 364, 399).

P. R. J.

No. 28.—*Covenant not to carry on noisy Trade—Binding Purchasers.*

In 1858, T. S. conveyed a plot of land as to one undivided moiety, to dower uses in favour of A. in fee, and as to the other undivided moiety to similar uses in favour of B. in fee.

On the 20th December, 1854, A. and B. conveyed part of the same land to M. in fee, and other part to N. in fee, both purchasers covenanting with the vendors, their heirs and assigns, that no noisy trade should be carried on upon the land conveyed to them respectively.

In May, 1855, M. conveyed part of his land to X. in fee; X. entering into a similar covenant with M., his heirs and assigns.

In June, 1855, N. conveyed part of his land to L. in fee.

X. has broken his covenant, thereby causing especial annoyance to Z.

Has Z. any, and if so, what remedy for the injury he sustains.

J. O. H. T.

ANSWERS TO MOOT POINTS.

No. 25.—*General Devise—Trust Estates*
(*ante*, p. 245).

I should have had but little hesitation in giving my opinion on this point, by answering the question in the affirmative, had the latter clause, bequeathing the legacy of £100 payable out of the residue, been omitted; and the cases would bear me out in such opinion (*Baring v. Booth*, 1 Law J. Rep. (N. S.) Ch. 204; *Braybrooke v. Inskip*, 8 Ves. 417). But, after carefully considering both the clauses of the bill, I am obliged to give my opinion in the negative.

In the leading case of *Braybrooke v. Inskip*, in which the question was determined whether a general devise passes trust estates, Lord Eldon said, the rule was not in his judgment; that in every case where

general words are used, the property shall or shall not pass; but that in each case every part of the will must be looked at for the intention with regard to such property. Then, commenting upon *Attorney-General v. Buller* (5 Ves. 339), he said he knew no case which states, as a rule, that trust estates shall not pass, unless the intention that they should pass appears; and he inclined to think they would pass, unless he could collect from the will or purposes or objects of the testator that he did not mean they should pass. The result is this: a will containing words large enough, and no expression in it authorising a narrower construction than the general legal construction, nor any such disposition of the estate as is unlikely for a testator to make of any property not in the strictest sense his, nor any purpose at all inconsistent with as probable an intention to vest it in the devisee as to let it descend—he knew of no case in which a mere devise in these general terms, without more, where the question of intention cannot be embarrassed by any reasoning upon the purpose or objects, has been held not to pass trust estates.

Regarding the above judgment of Lord Eldon's, and applying the rules there laid down to this case, it seems that under the devise of all the residue of testator's estate and effects, without anything appearing besides in the will to show the intention of the testator was contrary to such a construction, will pass trust estates. But here a question arises, whether the legacy of £100 being made payable out of such residue does not show that the intention was that trust estates should not pass? It is inconsistent with the nature of trust estates that they should be chargeable with the trustee's debts or legacies; and to make them so would constitute a breach of trust. Here there is a question of intention of a testator, whether certain trust estates do or do not pass by his will; if they were meant to pass, and do actually pass, they are directed to be liable to the payment of a legacy, which is a breach of trust. If otherwise, they are not so liable, and there is no breach of trust. Are we to say that they do pass, and that there is a breach of trust, when we have no actual good ground for saying so? Are we to presume the testator intended a breach of trust when we have nothing to tell us whether he did or did not so intend? I think this would be a disposition of the estate as is unlikely for a testator to make of any property not in the strictest sense his; and the direction is inconsistent with an intention to vest it in the devisee; and I must therefore express my opinion that the trust estates do not pass.

V.

THE LAW STUDENTS' LIBRARY.

The Law Students' First Book. By the EDITORS OF THE LAW CHRONICLE. Parts 1—5. Day, 13, Carey-street.

The above work is one of a series which we are engaged in producing in order to meet the requirements of the profession. It is not our intention to give a formal notice of the work whose title is above given, and which is now in course of publication, but rather to explain the object and plan of the whole intended series, which we are the more anxious to do as we find great misconception prevails among several of the subscribers.

The various works are intended to be of a *practical* nature, giving in as small a compass, and at as moderate a price as possible, matter of importance as well to the student as to the solicitor. With respect to the student, it has been, in the first place, assumed (and experience is the basis of such assumption) that the sooner he gets initiated into the practical parts of the profession the better; that theory will be better appreciated after the student has obtained a good insight into practical matters. In the next place, that for such purpose a series of works founded, in a great degree, on the actual modern decisions will be infinitely more useful, as being more likely to be read and understood than larger works written in a more diffuse style, and aiming at completeness. In the next place, a not unimportant consideration is, that nothing be given which will have to be immediately *unlearned*, on account of obsolescence or recent statutes; and also, that not only is the time of the reader to be saved, but also his pocket, by furnishing him with just what he requires without any extraneous matters. These are the points which have been kept in view in drawing up the plan of the LIBRARY. The series will comprise the following works:—I. *The Law Students' First Book*; II. *The Principles of the Common Law*; III. *The Practice of the Common Law*; IV. *The Principles of Equity*; V. *The Practice of Equity*; VI. *The Principles of Conveyancing*; VII. *The Bankruptcy Laws*; VIII. *The Criminal Laws*. Originally, a number of forty pages was issued monthly; but, on the request of several subscribers, this has been increased to eighty pages; and for the future each work will be completed in *four* numbers; the price of each number being 2s.—making 8s. per volume. The present work has somewhat exceeded these limits, but it will be complete in March next. We are surprised to find, from a recent communication, that two matters do not meet with the approbation of all the subscribers:—1, the price; 2, the references to this publication. As to the first, it is alleged that the work is too dear; much less being given for the money than is usual. This is a great mistake; just the reverse being the case, as will be evident by comparison with other works. Take Hughes' *Practice of Conveyancing*. For a part of that work, containing 108 pages, the charge is 3s. 6d.; and the page is much smaller than ours; whilst we give eighty pages for 2s., or at the rate of 140 pages for 3s. 6d., being, in fact, more than equal to double the quantity for the same sum. Again, take Fisher on *Mortgages*, and for 800 pages the charge is 25s.;

whilst we give for that money at the rate of 1000 pages. It will therefore be apparent that the LIBRARY is an unusually cheap work. As to the second grievance—viz., that frequent references are made to this publication, we must admit the charge, but we really think it a great advantage, especially in such a work as the *FIRST BOOK*, where, from the variety of subjects noticed, it has been impossible to treat of them always at the length which their importance might merit. We thought this deficiency might be well supplied by referring to the pages of THE LAW CHRONICLE for further information, and we cannot but think that this very much adds to the value of the work to those who have the CHRONICLE. Indeed, a great feature of the works is, that they will contain references to each other, and so make up, when completed, a series of uniform treatises, and the addition of references to the CHRONICLE appeared to offer a good opportunity of extending this feature. We cannot think that any of our readers who have the CHRONICLE can object to this, as really it brings within a small compass, and in a readily accessible manner, a much larger amount of information than could have been given in three times the space.

As there may be some of the readers of the CHRONICLE who have not yet seen the LIBRARY, we will give an extract to enable them to judge for themselves whether it is a work which will or not be serviceable to them. We should have added that the real title of the work ought to have been "*Outlines of Practical Law*," and this announcement will probably prevent the reader from being surprised at the practical nature of the work:—

Reading, executing, and delivering deeds.—To make a good deed, it must be read to any of the parties who desire it; for otherwise as to him, it is void. So also the party whose deed it is should *seal*, and in most cases *sign* it; but the most essential requisite is its *delivery*, for it takes its effect entirely from this ceremony. The delivery may be either to the party himself, or to a third person, on condition, and it is then called an *escrow* (12 Law Journ. Ex. 329; 3 Law Chron. 302). To commemorate the execution, it is usual (but not necessary, except in the case of a deed executed under a power requiring it) that the execution should be attested in the presence of witnesses.

"*Consideration—Voluntary deeds.*—The consideration of a deed may be either a good or a valuable one (3 Law Chron. 166; 2 Id. 885). A *good* consideration is such as that of blood or of natural love and affection, as where a man grants an estate to a near relation; a *valuable* consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant. Deeds made without any consideration whatever, or even those made for good, though not for valuable consideration, are said to be *voluntary*; and by force of the statute 27 Eliz. c. 4, voluntary deeds are void as against subsequent *bona fide* purchasers (even with notice of the voluntary deed, 9 East, 59; 2 Law Chron. 406), and also void by 13 Eliz. c. 5, as against creditors, where the grantor is indebted at the time (3 Law Chron. 220, 242, 317, 344, 356, 369). The principle on which voluntary convey-

ances have been held to be fraudulent and void as against subsequent purchasers is, that by selling the property for a valuable consideration, the seller so entirely repudiates the former voluntary conveyance as that it shall be taken conclusively against him and the person to whom he conveyed, that such intention existed when he made the conveyance, and that it was made in order to defeat the voluntary conveyance. But this principle does not apply where the seller is a different person from him who executed the voluntary conveyance, and, therefore, neither the heir nor devisee of the voluntary conveyor, nor a purchaser of valuable consideration from them, can prevail over the voluntary conveyee (*Doe v. Rusham*, 16 Jur. 359). If a settlement be made by a person who, if he had not made the settlement, would have had property upon which his creditors might immediately fasten and pay themselves, but which by the settlement is withdrawn, that is, *prima facie*, "delaying his creditors" within the meaning of the 13 Eliz. c. 5. If the creditors are delayed by a voluntary settlement, the case is within the 13 Eliz. c. 5, even though the settlor may have debts owing to him, or other contingent or reversionary interests, which, if realised or fallen in, would be sufficient to meet all claims upon him (*French v. French*, 2 Jur. N. S. 169; 28 Law Journ. Ch. 612; 8 Law Chron. 220; as to subsequent creditors setting aside the voluntary deed, see *Jenkyn v. Vaughan*, 2 Jur. N. S. 109; 25 Law Journ. Ch. 338; 3 Law Chron. 60). In order to entitle the voluntary donee to assert his rights under the voluntary deed, there must be either an actual transfer of the subject-matter, or a good and complete declaration of trust (*Bridge v. Bridge*, 16 Jur. 1032; 3 Law Chron. 44, 257, 344, 345; *Parnell v. Hington*, 28 Law Tim. Rep. 217). So all deeds are liable to be impeached if founded on immoral or illegal consideration, or if obtained by fraud, though a valuable consideration was paid (*Harman v. Richards*, 22 Law Journ. Ch. 1066). But in general, their legal efficacy will not be prevented by the mere want of consideration. For in this respect they are distinguished from simple contracts, that is, contracts not under seal; to the validity of which some consideration is essential. It is usual upon a purchase or mortgage, to indorse upon the deed a receipt for the consideration money in addition to the acknowledgment contained in the body of the instrument; the former is *at law* an estoppel, but the latter is not; whilst in equity the indorsed receipt is alone regarded, and its absence is notice of the money not having been paid, though it is not constructive notice of other irregularities in the transaction (*Burt. Comp. pl. 635*; *Greenalade v. Dare*, 20 Beav. 284; *Horsely's Purch. Deeds*, 38, note).

The future volumes of the LIBRARY will necessarily be of a still more practical nature; but they will have one feature in common—namely, conciseness, so far as consistent with the due explanation of the various subjects which they will comprise.

NOTICES TO CORRESPONDENTS.

H. S. T.—We think that the service for a year with London agents, who are not notaries, will not suffice.

LEX.—It is impossible for us to say why the other Debating Societies do not send to us reports of their discussions. There is no charge for insertion. We were formerly favoured with particulars of the Society in the Law Institution, but with change of officers there has also been a change of practice.

S. F.—We have not yet heard any particulars of the meeting on the 21st of January, so that we can give no information at present. We have been accused of being unwilling to give a helping hand, though we have inserted everything sent to us, and Mr. Walker's last communication arrived after we went to press, but we stopped the press and had it inserted.

LIBRARY.—We have noticed this work elsewhere in this Number, for the satisfaction of those of our subscribers who are anxious to see a specimen before subscribing. A double Number is now issued each month, so as to complete a volume in four months.

S. T.—You should have addressed yourself to the Honorary Secretary, though we do not think that your remonstrance would have any weight; at least the general opinion is against you, as the examiners may go beyond what is really requisite, especially if urged by those who being already admitted are not unwilling to place impediments in the way of others.

W. M.—There are no great additions in the last edition, and therefore we would advise you to put up with the one you have. The alterations are noticed in the "*First Book*," and will be more fully detailed in the "*Principles of the Common Law*."

LEGALIS.—You will not be in time for Easter Term. The answers need not be very long. Endeavour to answer those first which you think on perusal you understand.

T. F.—There are two volumes of the "*Key*," and we do not consider the price is too large. The work you refer to is not complete.

A. B.—From four to six hours' study a day is ample, and the greater part would be most profitably spent in reviewing or discussing what had been before read. You should read other works, or at least those intended to be brought out in the "*Library*." If you have in the office the *Law Journal*, you might read the reports, or any other general work; but, speaking generally, it is better to read a little thoroughly than much cursorily. Discuss what you read.

* * The questions are printed ready for the candidates when they take their seats. No particular books are named.

ERRATUM IN LIBRARY.—*Animals—Impounding—Food*.—By an oversight at p. 236 of the *First Book*, the 5 & 6 Will. 4, c. 59, is referred to as an existing statute; but it has been repealed by the 12 & 13 Vic. c. 92, which in its turn has been amended by the 17 & 18 Vic. c. 60, as will be found stated in 1 Law Chron. 154, 155. Readers will be pleased to notice this.

The Law Chronicle.

No. 46—Vol. IV.

MARCH 1, 1858.

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CORRESPONDENCE.

(To the Editors of THE LAW CHRONICLE.)

SIR,—We articled clerks as a body are curious creatures, and entertain at times various and odd opinions upon what is right. Do we not? I think, sir, I see you nod an assent. Therefore, classing myself among their number, I have "entertained" the following "opinions," and, with all due deference, beg to lay them before you for your consideration.

The examiners, as you are aware, have lately introduced prizes for those articled clerks who, being under the age of twenty-six years, have displayed more than merely sufficient knowledge in passing their examination. "The Honourable Society of Clifford's Inn," too, have very handsomely added a further inducement to articled clerks to give to their studies that attention which the importance of the subject requires. But, sir, these inducements are withheld from all articled clerks who happen to be above the specified age. Now, that this is to some extent a hardship is too plain to be denied, and I fear the examiners, and, indeed, the Honourable Society of Clifford's Inn, too, will not feel disposed to alter the age allowed for distinction. The subject has had the attention and discussion of one or two articled clerks and it was ultimately arranged that a communication should be made to the editor of their avowed organ—THE LAW CHRONICLE—on the subject, and that the following proposition should be submitted:—

It is suggested, then, that as the examiners have offered a prize to those candidates whom they think worthy of one, and as the Honourable Society above referred to have done the same, the Editors of THE LAW CHRONICLE should "follow in the wake," and offer a prize of some sort to such articled clerks (whatever their age) as they in their judgment should think deserving thereof. Of course, in this case, articled clerks would have to leave a copy of their answers at the LAW CHRONICLE office for perusal, and I cannot think that there is one articled clerk who would think too much of his trouble to do so.

I am sure you will excuse my seeming boldness in making and laying before you this proposition; but as it has for its object the interest of articled clerks generally, I am sure I shall be excused for making this communication. I am, &c.,

PEN AND INK.

NOTE.—The proposition of our correspondent is an extremely modest one, but, as our modesty is equal to his, we must beg to decline the double honour, of first deciding on the relative merits of the

answers, and then awarding to the most meritorious of the candidates, out of our own pockets, a suitable *solatium*. No doubt our correspondent's proposition contains in it a germ of utility, which articled-clerks might apply to their advantage, but we doubt whether any one who has passed his examination would feel any interest in it—to be acceptable it must be for the benefit of those who have the dreaded examination before their eyes. In our opinion, it would be well for articled clerks to subscribe and form a fund to be given for the best answers to the questions at the different examinations. There would then be no lack of candidates, and much benefit would accrue to them.—Eds.

MOOT POINTS.

No. 28.—*Covenant not to Carry on noisy Trade* (ante, p. xxx).

I take the liberty of calling your attention to a mis-print which occurs in the fourteenth line of my moot point, the letter (L.) being put instead of (Z.).

It should run thus:—"In June, 1855, N. conveyed part of his land to Z. in fee."

The error was doubtless occasioned by indistinctness in my writing, and will, I fear, make the moot unintelligible to correspondents. J. O. H. T.

No. 29.—*Railway—Riding in Wrong Class—Conviction.*

At various stations on a certain line of railway are posted notices to the effect that several persons are constantly discovered riding in a superior class to that for which their tickets are taken, and stating that persons so discovered will be taken before the magistrates, and fined in any sum not exceeding forty shillings, in addition to the extra fare between the class for which their tickets are taken, and that in which they are discovered.

A short time since, A. took a second class ticket from S. to K., and (accidentally or otherwise) rode in a first class carriage. On alighting at K., he was informed of the fact, and voluntarily tendered the difference of fare. This was declined, and A. was summoned before the magistrates, and convicted in the full penalty, exclusive of costs, and had also to pay the difference of fare.

The mooter wishes to know whether the conviction was legal; he inclines to the opinion that it was not, inasmuch as the tender of the difference of fare was *prima facie* evidence of his non-fraudulent intention. Perhaps some correspondent will give an opinion, and, if possible, cases in support thereof, or otherwise, and oblige, FIAT JUSTITIA.

DEBATING SOCIETIES.

BIRMINGHAM LAW STUDENTS' SOCIETY.

Moot Point, No. 239.

Is a surety discharged by the creditor giving time to the principal debtors where the fact of suretyship is not disclosed by the contract?

The law on this point being remarkably unsettled, rendered it a very good subject for the discussion of this society. The fact that a surety is not liable when time is given to the principal (the suretyship being plain and apparent, and the creditor having agreed to accept the surety as such) is so patent, and known to all, that it can require no proof. It must be premised, however, that the creditor has obtained knowledge from some extraneous source, or otherwise, that the surety is not a principal in the contract, and has not reaped any benefit therefrom.

For the affirmative were urged the important cases of *Pooley v. Harradine* (26 L. J. R. Q. B. 156) and *Stainbank v. Davies*, before the Lords Justices, as cited and commented upon in *Pooley v. Harradine*. The real point in this question seems to be whether extraneous evidence can be imported to vary a written contract; but in *Pooley v. Harradine*, Coleridge, J., says "that the surety must be discharged by virtue of an equity not arising out of the contract, but independent of that contract,"—that is to say, that it is not right that the creditor (knowing, no matter how, the fact of suretyship) should place himself in such a position, by giving time to the principal, as would preclude the surety from obtaining his remedy over against the principal.

The Court of Queen's Bench, and also the Lords Justices, as is shown by the above cited cases, seem to be inclined to carry this doctrine to a very great length, and doubtless there is much to be said in its favour. The same spirit has prevailed throughout many of the earliest cases on the subject, but latterly the judges took a very different view of the point, until the decision of the cases relied upon by the advocates of the affirmative side of the question.

The negative, on the other hand, cited the cases of *Manley v. Boycot* (2 El. and Bl. 46); *Strong v. Foster* (17 C. B. 201); and *Hollier v. Eyre* (9 Cl. and Fin. 45). In the first two of these cases it was distinctly laid down that, in order to discharge the surety, it must be shown that the fact of suretyship was known to the creditor at the time the written contract was entered into. These cases are certainly very strongly opposed to the view taken by Coleridge, but the meeting felt that it could not pretend to overrule the more recent cases of *Pooley v. Harradine* and *Stainbank v. Davies*; the decision was therefore in the affirmative, with a reservation

that if the point should come before a court of error, it was by no means certain that the decision would be confirmed.

R. H. MILWARD, Corresponding Secretary.

THE MONTH'S SUMMARY.

County Magistrates and the Criminal Justice Act.

—The following case and opinion, with reference to the practice of county magistrates under the provisions of the Criminal Justice Act, will interest those of our readers who are concerned in the proceedings of petty sessions:—Case laid before W. N. Welsby, Esq., by order of the Cheshire Court of Quarter Sessions, and opinion thereon. Mr. Welsby will please to say whether a justice residing in and usually acting in one petty sessional division, can legally attend the petty sessions holden in another petty sessional division, under the Criminal Justice Act 18 & 19 Vic. c. 126, and take part in adjudicating upon cases of larceny, &c., under that act.—Opinion:—"Temple, Aug. 17, 1857. I am of opinion that a justice of the peace, residing in and usually acting in one petty sessional division of a county, may legally attend the petty sessions in another such division, and there take part in adjudicating upon cases of larceny, &c., cognisable under the 18 & 19 Vic. c. 126. The justices in the commission of the peace for the county have jurisdiction as such throughout the county; and I apprehend that the only limitation imposed by this act of Parliament is, that the larceny, &c., shall have been committed within the petty sessional division in which the case is adjudicated.—W. N. Welsby."

Husband and wife—Separation deed not avoided by cohabitation.—A separation deed may provide for the payment of an annuity to the wife during her life, and not merely during the time of separation. A deed of separation between husband and wife, containing a covenant by the husband to pay to a trustee for the wife a certain sum during her life, was made subject to a proviso for the avoidance of the deed on the husband and wife agreeing in writing, attested by two witnesses, to cohabit, and cohabiting thereafter for a certain time. The husband and wife having subsequently cohabited, but without any formal agreement in writing to do so, as mentioned in the proviso: Held, that the deed was not thereby avoided. *Randle v. Gould*, 6 Week. Rep. 108; 30 Law Tim. Rep. 108.

Settled Estates Act—Examination of married woman, being a petitioner under the act, should be taken immediately after the presentation of the petition, overruling the previous decision in *Re Hooper*, 5 Week Rep. 670; *Re Foster*, 5 Week. Rep. 726; 4 Law Chron. 48.

Legacy—Vested.—Where there is a gift to children, with a direction to pay and divide the fund at twenty-one, the gift is vested, and the period of payment merely postponed; but where the whole gift consists in the direction to pay or divide at twenty-one, the period of vesting is the time of payment or division (per V. C. Wood, in *Re Theed*, 29 *Law Tim. R.* 292).

NOTICES TO CORRESPONDENTS.

LEX U.—The mere reading of a number of volumes is no test of progress. The point is, what do you comprehend on the review of a day's reading? It is unfortunate you have no one with whom to discuss the different topics, but you must strive more and more to accomplish your purpose by meditation and frequent re-perusals. There is no occasion for despair, except you are incurably idle; and in that case you had better turn to some other mode of living.

J. T.—We are obliged by the intimation, and will avail ourselves of it. There should be a debating society in every place where two or three articulated clerks are to be found. Locke on Government is by no means a necessary book for a lawyer to read.

TIM.—The practice of public speaking is one that should be cultivated by every professional person, but you must take care not to be led too much away from legal topics, and frequently in such societies there is danger of picking up bad companions, and of getting into evil ways. There are several clubs of the kind you speak of, but they are mostly, if not wholly, held at taverns, &c.

S.—The "*Key*" does not give the *old* answers, but according to the *new* practice. There is nothing to mislead. Mr. Holthouse's Dictionary is a very useful one, as well as moderate in price.

B.—The dictionary just mentioned, if you wish for a concise work. We have not yet seen the new edition of Stephen, as the publishers conceive, we suppose, that it does not now require any recommendation or notice.

LIBRARY.—We will insert a list of ERRATA in the next Number of the "*Library*," which will complete the "*First Book*." We are obliged for communications, and shall be glad of any future ones. At p. 167 *French v. F.* should be 26 L. J., and not vol. 28.

LEA.—The proposed examination will not affect clerks under articles, and therefore you need not be under any apprehension. The questions are printed. Your answers will be better appreciated if made as concise as possible.

H. H. S.—We have considered the subject, but do not see our way clearly. At present the "*LIBRARY*" is not supported as it should be, and we do not therefore feel encouraged to venture on anything else.

M. A.—Three years' service would be effectual. Practical knowledge is essential, and you should make up your mind to go through the necessary course of office duties. There is nothing in them to prevent your also reading at least after office hours. We would not advise you to go to the bar, as that is overmuch stocked, both with men of intellect and men of connections. Of course you *might* get on, but it is more of a lottery than is the case with the other branch of the profession.

S. E.—Addison on Contracts, or Chitty on Contracts, would answer your purpose. We shall next month finish the "*FIRST BOOK*," and in April commence with "*PRINCIPLES OF THE COMMON LAW*." The new edition of Hayes' Short Forms has not yet appeared.

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LAW OF PROPERTY AMENDMENT BILL.

Condition of re-entry, only partial dispensation—Omission to insure relieved against—Release of part of land from judgment—Uses of lands fully executed—Execution of powers by deed—Payments to tenants for life—Informal execution of will.—The very important measure of Lord St. Leonard's, having the above title, has passed through the second reading, and has been sent into committee to be discussed and no doubt amended, if not improved. As our readers may like to know the subjects proposed to be effected, we will here shortly state the substance of the measure as appears from the speech of Lord St. Leonard's in proposing the second reading. His Lordship said that one of the objects of the bill was to alter the law as it had been laid down in the well-known case called *Dunpor's case*, reported 4 Coke's Rep. 120, and Cro. Eliz. 816. According to that case, if a lease were granted on a condition and the landlord licensed a breach of the condition, the condition would be gone for ever, and could never be enforced again. He proposed that in future the licence to break a condition should only extend to the particular breach, and should not operate as an entire release of the condition. Other provisions related to the covenants to insure contained in leases. At present, if a lease contained a *covenant to insure*, with a right of re-entry for breach, then, if the covenant were broken, the landlord might re-enter and avoid the lease, although no loss had been incurred. He proposed to enable the Court of Chancery to *relieve against the forfeiture* thus incurred, on payment to the landlord of double the amount of the insurance money which ought to have been paid, with interest at 5 per cent. It had now become usual, on the sale of leases containing a covenant to insure, to insert a condition of sale, to the effect that the production of the receipt for the last portion of rent due, and of the production of the policy of assurance then afoot, should be considered sufficient to constitute a good title. Nothing, however, could be more unsafe than to take property under such a title, for if it had been at any time before uninsured, and the landlord had given the subsequent receipt for rent in ignorance of the breach of covenant, he would be able to recover the property from a purchaser. He now proposed to enact that when the purchaser was not aware of the breach, he should not be liable to be disturbed. An opinion had been intimated, and it had been erroneously supposed to have been decided, that the *days of grace* were not given in policies of assurance so as to be binding upon the assurers. Most of the offices had, indeed, issued circulars stating that they

admitted the days of grace to bind them. He had lived long enough, however, not to trust directors, and he, therefore, proposed to make it imperative upon them to allow days of grace when they were inserted in the policy. The directors of the Law Life Office stated they conceived the clause which he had drawn up with this object to be perfectly fair both to the assurers and assured; but if any directors of any office entertained a different opinion, he should be perfectly ready to listen to their objections. Following the precedent of the law in Ireland, we propose to enact that a *release of a part of the land from a judgment* shall not operate beyond the actual portion released. There was also some difficulty and inconvenience in the existing law regarding the possession of the estate and the use of it. He proposed to enact, that after the conveyance had been executed, *every use and right shall be executed by statute* as they arise, without reference to any seisin. He proposed to place the law as regards the *execution of powers by deed* on exactly the same footing as the law now stood in regard to the execution by will. He proposed that property and power should be placed on the same footing, and without the slightest difference. If a trustee should sell an estate, having powers to do so, and by mistake certain benefits were conveyed to the tenant for life which he ought not to possess, he (Lord St. Leonard's) proposed, if it were shown that those benefits were conferred by mere mistake, and that no fraud was intended, that the estate, under such circumstances, should not be taken away from the innocent party who had paid his money, but rather that compensation should be given to the individual entitled to it equivalent to the injury inflicted. He proposed, therefore, that where the *payment* had been made to the *tenant for life*, and by a manifest mistake the money was paid to the tenant for life which ought to have gone to the trustees, the error might be remedied without any loss to the party otherwise damaged, in the same manner as if the money had been received by the trustees instead of the tenant for life. In regard to the *execution of a will*, if the court should be of opinion that there had been no fraud in the execution of the document, but that it had been executed merely for convenience in a manner different from that pointed out by the existing law, he proposed that it should be held to be a valid will. He proposed, in fact, that the acknowledgment by the testator of the will itself should be taken as an acknowledgment of his signature to it.

LIST OF CORRESPONDENTS.—The following is the only addition to the lists before published, *ante*, pp. 10, xiv., xx., xxiv.—namely, Mr. Henry Horsell, of Wootton, Bassett.

RAILWAYS LIMITING THEIR LIABILITY FOR DAMAGE TO HORSES, &c., CARRIED BY THEM.

We have shortly stated elsewhere the recent case of *M'Manus v. Lancashire and Yorkshire Railway Company* (6 Week. Rep. 330) decided in the Court of Exchequer. The decision involves a principle so important that it cannot be too widely known, and, if it can be supported, will certainly lay the public open to very grave risks. It was decided that a railway company, by a notice sufficiently comprehensive printed on the back of their tickets, can protect themselves from all responsibility resulting from damage arising from the defects of their own trucks for the carriage of live stock. This is shifting the responsibility from the right shoulders; it is throwing the obligation of vigilance on the wrong party. If this is to remain as the exposition of what the law is on the subject, it is obvious that no care can protect the public from loss, and that one inducement to companies to keep their rolling stock for the conveyance of animals in a state of efficiency will be withdrawn. As appears from the report of the case, the facts were these:—*M'Manus* delivered some horses at Liverpool to the employees of the Lancashire and Yorkshire Railway to be forwarded to York; he paid the rates charged by the company, and received a ticket with the following endorsed memorandum:—"N.B.—This ticket is issued subject to the owner's undertaking all risks of conveyance, loading, or unloading, whatsoever, as the company will not be responsible for any injury or damage howsoever caused, occurring to any live stock of any description travelling upon the Yorkshire and Lancashire Railway, or in their vehicles." The truck into which the horses were put was insufficient for their safe carriage, so much so that a hole was made in the bottom of it during the journey, which resulted in the injury to the horses. The Court of Exchequer decided that the memorandum on the back of the ticket operated so as to protect the company, and to throw the entire loss incurred through the dangerous state of the truck upon the sender of the horses.

The question is not, was the memorandum endorsed on the ticket, *per se*, sufficiently comprehensive to admit of this decision? but it is, shall a railway company be enabled by such a memorandum to protect itself from losses arising exclusively from the negligence of its own servants? shall a company be entitled to force an individual into a compact that that individual shall alone be responsible for any damage arising from the defective condition of their own rolling stock? Now a railway company is a monopolist, invested by the Legislature with the exclusive privilege of making and maintaining a line of rails between two given points. No person or other company, can interfere with this right, or make a line connecting the same places, without the special sanction of Parliament. Every railway bill that is passed is passed in derogation of rights of the public at large; it is, in fact, the rights of the whole community delegated to the individuals that constitute the company; but the company is invested with an exclusive exercise of such rights solely because the country ultimately benefited by such

delegation. Well, then, we may ask, if a company is clothed with certain exclusive privileges, is it unfettered by any correlative obligations? If it be, one would think that no obligation could transcend that of keeping its vehicles in a state of adequate repair—of affording to the public, of whose rights it enjoys the exclusive exercise, an effectual guarantee that its engines, trucks, rails, and everything necessary to effect safe transit are in a sound condition. This decision negatives this obligation; it proclaims that railway companies owe no such duty to the public, or at all events that they can securely evade that duty by printing on the backs of their tickets a form of words framed by some astute lawyer. Perhaps it may be said that if any man sends stock by a railway it is inequitable that he should do so upon any terms the company please, as if he does not like their terms he need not deal with them; but a railway company and an individual do not stand on equal terms. The position of a railway company as a monopolist of the means of rapid transit enables it to force any conditions, however unreasonable, upon individuals. So well is this recognised, that Parliament invariably lays companies under certain conditions as to their traffic. Thus every company is obliged to run what is termed parliamentary trains; trains, not for the conveyance of members of Parliament, but trains which the law requires to be at a low rate of mileage.

Then no vigilance on the part of the sender of live stock by rail can protect him from loss, if not ruin. How is he to know the condition of the trucks? Can he select those into which his stock are to be put? Would any railway company tolerate such interference? Then, as Chief Baron Pollock is reported to have remarked, what regards the truck "is equally applicable to the engine, the rails, turning points, and everything necessary to the safe carriage of the animals." Is the sender of stock to call for the engineer's last report on the state of the rails; or is he to employ an engineer to give his opinion as to the condition of the permanent way? The thing is too absurd. It demands that the sender shall exercise his vigilance, and that the company, by a memorandum which they choose to put on their tickets, shall be relieved from all loss resulting from their own criminal negligence. Is it to be tolerated that the loss arising from the defective state of the rails is to be borne by the sender? Is the company to be allowed to let their engines go out of repair, and yet not to be liable for the damage occasioned by such misconduct? This would reduce the public to the unfair alternative of being obliged either, on the one hand, to accept the responsibility of risks that they cannot by any possibility estimate or avert, or, on the other, refrain from sending stock to market by the most rapid means of transit.

MOOT POINTS.

No. 30.—*Mortgage—Fixtures—Registering Bills of Sale, and Warrants of Attorney.*

A., a brewer, is about to lend D., a victualler, a sum of money, to secure which, and also any balance of account he may owe A., it is proposed

D. should mortgage his lease of certain premises, and should include in such mortgage a large quantity of fixtures he has placed in the premises since the lease was granted. Will it be necessary to register this mortgage under the Bills of Sale Act?

Also, in order to secure possession of the premises (the mortgagor being in possession), it is proposed to take from him a warrant of attorney in ejectment, which warrant has a defeasance, which recites the mortgage, and states that the warrant is given for further securing the payment of the amount. Does this defeasance and recital make the action to be brought on the warrant "personal" within the meaning of the act for the registration of warrants of attorney? and if so, must it be finally attested and registered?

Lastly, ought such warrant of attorney to be stamped with an *ad valorem*, a 5s., or a 35s. stamp?

W. BARTLETT

No. 31.—Mortgage—Priority—Notice.

A. B., in the year 1844, mortgages his estate to C. D. for £800.

In the year 1846 he mortgages the same estate to E. F. for £500, the same solicitor being employed for both mortgagees—viz., C. D., and E. F.

In the year 1850 he mortgages the same estate to G. H. for £400, who omitted to give any notice to the first or second mortgagees, or their solicitor, of his incumbrance.

In the year 1854 A. B. further mortgages the same estate to J. K. for £500, who gave due notice to the solicitor of the first and second mortgagees of his incumbrance, which said solicitor witnessed the execution of the said mortgage by the mortgagor A. B., neither J. K. or the solicitor to the first and second mortgagees having, at that time, any knowledge whatever of the third mortgage to G. H.—in fact, it is only lately that it has come to their knowledge.

The estate is supposed to be worth about £1,700. Consequently G. H. or J. K. must lose his money so advanced, the mortgagor, A. B., having no other property. Under these circumstances, will not J. K. (who gave proper notice of his incumbrance to the solicitor to the first and second mortgagees) take in preference to G. H. (who omitted to give any notice of his incumbrance), though G. H. be the prior mortgagee.

R. J. B.

No. 32.—Liability of Principal for not giving Receipt to Agent.

An agent employed to collect debts gave stamped receipts in the name of his employer, to each of several purchasers of corn, and, upon the agent paying over the amount of the several sums he had so received, his employer refused to give him a receipt for it.

Quære—Was the agent entitled to demand a receipt, or, in other words, has the employer rendered himself liable to the penalty for refusing to give a stamped receipt?

B.

No. 33.—Posthumous Child.

Will you oblige me with answer to the following question:—

An estate is limited to A. for life, remainder to the eldest son of B. in fee. A. dies before the birth of

any son of B. Within such a reasonable time after A.'s death, as to make it almost a certainty that he was in *ventre sa mère* at the time of his death, a son is born. In this case would the remainder take effect in such son or be void? Is not the rule in Shelley's case to the effect that a remainder is capable of vesting in a child who is in *ventre sa mère* at the time of the determination of the particular estate?

AN ADMIRING READER.

P.S.—Please refer to some authority on the point.

No. 34.—Public Nuisance.

A gun committee have erected a stand some three feet in height, and placed on it a twenty-four pounder, being one of the guns taken in the late war with Russia.

The stand is erected just opposite the window of a house, and obstructs the light very much.

It is generally considered a nuisance, as it is placed just in the principal part of the Market Street.

A public meeting has been held, in order, if possible, to get it removed, but all to no purpose. It is clearly a public nuisance, and generally considered so by the inhabitants.

The overseers have given their consent in writing. A vestry was held, and one overseer was present and signed, and the other signed afterwards.

What will be the best plan to adopt in order to its removal? Perhaps some of your numerous correspondents can inform me.

H. H.

NOTICES TO CORRESPONDENTS.

A. B.—Four hours a day would suffice, if care be taken, to digest what is read. You should read some works on equity and common law principles and practice, and upon conveyancing, unless you can wait for our volumes. On the 15th Common Law Principles will be commenced. You appear to have read more than usual in seven months, but, unless you have fully comprehended the subjects, no real progress will have been made.

AN ADMIRING READER.—We fear you are confounding the rule; a posthumous child may take a remainder limited in any instrument whatever when it vests (10 & 11 Will. 3, c. 16; Bassett v. Bassett, 8 Vin. Abr. 87; 3 Atk. 203).

QUERIST.—The Consolidation Act has been amended, and £150 assets must be shown (17 & 18 Vic. c. 119). You cannot be examined in Trinity Term, 1859, unless you can make out a very special case, as a partnership, &c.

H. D.—We do not know of any such list. Most persons can give a pretty accurate guess what books are meant.

S.—We do not see any object in making the proposed alteration. The degree must not be a stale one.

H. J. C.—We think if you read the volumes mentioned it will be sufficient for your purpose. It is uncertain when the other volumes of Jarman's Bythewood will be published. The old edition of Davidson would be serviceable, though the new one is preferable.

The Law Chronicle.

No. 48—Vol. IV.

MAY 1, 1858.

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REGISTRATION OF PARTNERSHIPS.

Among the other measures of legal reform introduced into Parliament, is one by Lord Gooderich for the "*Registration of Partnerships*," which we should think would be hardly palatable to many persons in business, though the profession need not object to it. The introducer of the measure informed the House that the subject was one which had engaged the attention of mercantile men for some years, and a large number of chambers of commerce had petitioned in favour of legislation such as that now proposed. The object of the bill was, that all who traded under any name other than their own should be required to inform the public who they were. All persons engaged in business knew how difficult it was to ascertain exactly who were the members of the firm with whom they were dealing. Many old firms had perpetuated their names when not a single person of the original firm remained; and it often happened that one person was a member of several firms. Uncertainty of this kind as to the partners opened the door to fraud, and the want of exact information as to who were the real members of the firm was a source of great difficulty and expense in conducting legal proceedings. Recent events in the commercial world had turned the attention of the public to the evils which existed in our system. The present bill required the registration of all firms not coming under the Joint Stock Act, or being banking firms. The machinery was simple and ready made to their hands. It was proposed that the superintendent registrars should be charged with the duty of registration, and a copy of the register should be sent to the general registrar's office in London. With respect to the enforcement of obedience to this statute it was proposed in the first place that no unregistered partnership should be capable of suing, while in the case of those who resolutely refused to be registered they should be subjected to a moderate penalty. In order to provide for the expenses, it was proposed that a small fee should be paid by the firm on registration. Such a measure as the present was one which would tend in a great degree to improve our commercial system, and prevent frauds, by throwing the light of publicity upon trade establishments. The bill did not touch on the question of the liability of partners, nor make the mere registration a proof of the liability of those whose names were registered. It appeared that the measure was suggested by the Commercial Association of Manchester, in conjunction with the Law Association of that town. The bill had since been discussed by the Law Reform Association in London, and its principle had been approved of by the Manchester Chamber of Commerce. It was simply in-

tended to do away with the inconvenience experienced by the commercial community in consequence of not knowing with whom they were dealing.

NOTICES TO CORRESPONDENTS.

J. T.—We believe the 3rd volume of Davidson will appear before long, but we cannot speak of the other volumes. We should hope that this would force the completion of Jarman by Sweet.

M. S. S.—We cannot satisfactorily advise you, unless we know what you have already read, and what practice you have seen, and how far you are able to understand and profit by what you read.

BLACK.—It will be time enough when we have got through the proposed series of works to resume the former incomplete series, of which Littleton only appeared.

F. M. E.—We are no great advocates of commonplace books, unless they are methodically kept, so as to be readily available, and are used for forming a new and intelligent summary of what is read. To merely transcribe out of books, especially if afterwards accessible, is a lamentable waste of time, and can hardly be said to strengthen the memory. The habit of writing down in your own words the pith of cases is useful, if accompanied by a clear understanding of the points decided.

T. T.—You will be entitled to be examined in Michaelmas Term. We should say that you have not read sufficient to pass, but so much depends on your capacity and business habits that we cannot give a positive opinion against your success. Try three or four sets of questions, and if you find you can answer the majority of them correctly, you may go in with some confidence.

C. O. B.—We cannot furnish the information as to the different law students' societies in existence. We have reason to believe that some of those noticed on former occasions have ceased to exist. We are at all times willing to give notice of the existence of any societies, and even to report their proceedings where they are of general interest. Why not try to form one in your town? Actual debating is better than corresponding. When you come to town, you can join the society at the Law Institution.

LEX (Birm.).—You must submit, for a time at least. Exert yourself, and, for the solicitors' own sakes, you will be put upon something more profitable to them and to you. We should hardly think they will object to your occasionally reading in the course of the day; but the evening is the proper time for study. Remember that it is an arduous and responsible profession, and one, we may add, that, in few instances, repays the labours and anxiety of its members. Our First Book would frighten you less than the four volumes, and would, at the same time, serve as an introduction to them.

ERRATUM IN LIBRARY.—At p. 80, Princ. Com. Law, l. 10 from bottom, for "lunar" insert "*calendar*;" it will then read, "the statute is a calendar month" (see *Ryalls v. Reg.* 11 Q. B. 781; 13 Jur. 259).

THE AUTHOR OF BLACKSTONE'S COMMENTARIES.

We understand that an *Elementary Treatise on Architecture*, from the pen of the celebrated Commentator on law, Judge Blackstone, and which is alluded to in his life as remaining in M.S., is now proposed to be printed by subscription, with a dedication to the Lord Chancellor, by his grandson, Mr. Blackstone, late M. P. for Wallingford. The work above alluded to, and which is enriched with numerous illustrative drawings by Blackstone himself, was written before he was twenty years of age. It is in its nature a skilful compilation and adaptation from several authors on architecture; and it has been thought, by those who have seen the M.S., and are capable of judging of its merits, to justify in every way the assertion of the learned commentator's biographer, who says, "it is esteemed by those who have perused it as in no respect unworthy of his matured judgment and more practised pen." As the noble lord who now fills the highest office of the law has consented to head the list of subscribers, we have little doubt his example will be followed by other influential members of the legal profession. The work we have stated will be published by subscription—the impression will be limited to 500 copies, and it is intended that one guinea shall be the amount of subscription for a single copy. It will be issued by Messrs. Butterworth, of Fleet-street.

MARRIAGE WITH DECEASED WIFE'S SISTER [*ante*, p. 244].

V. C. Stuart has delivered his judgment in the case of *Brook v. Brook* (*ante*, pp. 244, 245), which was argued before him, with the assistance of Sir Cresswell Cresswell, then one of the judges of the Common Pleas, in the month of November last; and on the 4th of December the learned judge, being appointed Judge of the Court of Probate, delivered his opinion as to the validity of a marriage with a deceased wife's sister in a foreign country, the parties being British subjects, although by the law of such country the marriage was legal; and in that opinion the learned judge declared that by law the marriage was illegal and void, and that the children of the second marriage were illegitimate (*ante*, pp. 244, 245). The Vice-Chancellor went through the whole facts of the case, and said he entirely concurred in the opinion and judgment of Sir Cresswell Cresswell. The facts of the case were, that in 1847 Charlotte, the first wife of the late

Wm. Leigh Brook, of Meltham Hall, near Huddersfield, died. By her he had one son and one daughter. In 1851, Wm. Leigh Brook intermarried at Altona, in the kingdom of Denmark, with Emily Armitage, the sister of his deceased wife. In 1855, the second wife, Emily died of cholera, at Frankfurt; and two days after Mr. Brook died of the same disease, at Cologne. By the second marriage there were born one son and two daughters. By his will Mr. Brook gave his real and personal property among his children of the two marriages in certain proportions. Charles Armitage Brook, the son by the second marriage, had died since the death of Mr. Brook, and the real question was, whether his share of Mr. Brook's real and personal estate went, as the realty, to Mr. Brook's son by the first marriage, and, as to the personalty, among all Mr. Brook's children equally; or, whether Charles Armitage Brook's share of such real and personal estate went to the Crown by reason of the invalidity of the second marriage. During the argument, it was contended that the marriage, being valid according to the laws of Schleswig-Holstein, was good in this country, and that the daughters were entitled to the share of Charles Armitage Brook to the property, and that it did not revert to the Crown, as the estate of an illegitimate. The learned Vice-Chancellor concluded by saying he had given the case his most careful consideration, and came to the conclusion that the second marriage was illegal and void, and that there must be judgment for the Crown (6 Week. Rep. 451).

The late Sir John Dodson.—The death of the Right Hon. Sir John Dodson took place on the 27th of April. Sir John was the eldest son of the late Dr. John Dodson, of Hurstpierpoint, Sussex, and was born in 1780. He married in 1822, Miss Pearson, eldest daughter of George Pearson, M.D. The deceased was educated at Oriel College, Oxford, where he graduated B.A. in 1801, M.A. in 1804, and D.C.L. in 1808. He was a member of the Middle Temple, of which he ultimately became a bencher. He was appointed Advocate of the Admiralty in 1829, and Advocate-General in 1834, on which occasion he was knighted. On her Majesty's accession to the throne, his patent of appointment was renewed. In November, 1841, he was appointed Master of the Faculties, and in 1852 Judge of the Prerogative Court of Canterbury and Dean of the Arches, when he was sworn-in as a member of her Majesty's Privy Council. The learned gentleman was formerly M.P. for Rye, from July, 1819, to March, 1823.

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MOOT POINTS.

No. 32.—*Action for Breach of Contract to sell Ice on a Pond—Interest in Land—License.*

A., the tenant of a mill, agreed with B. and C. to sell to them the ice which the season should produce on his mill pond for £3. The land on which the pond is situate is occupied by A.'s landlord. A. has a right of way to his mill running along the bank of the pond. B. and C. paid A. 5s. by way of earnest, and subsequently paid £2 15s. the balance of the purchase money, on which a receipt was given in these words:—"A. agreed with B. and C. for a pond of ice at ——— for the winter season. No person allowed to take a cart except these persons. Received £2 15s. as per agreement."

B. and C. came to the pond several times with carts, and took away altogether between 200 and 300 loads of ice. On the last occasion of their coming, A.'s landlord seeing that considerable damage was being done to the banks of the pond by the cart-wheels, prevented B. and C. taking away more ice, and ordered them off the land. Thereupon B. and C. brought their action in the county court against A. to recover damages for a breach of contract of sale of the ice, and also claimed the £3 as money had and received to the plaintiff's use. A. thought proper to return the £3, and paid it into court.

Quære: Can the plaintiffs recover.

The points to which the writer would direct attention are: whether the subject-matter of the contract is an interest in land, and therefore required to be in writing according to the 4th section of the Statute of Frauds; whether the receipt is a sufficient contract or memorandum to take the case out of the statute, and more especially, whether what took place did or did not amount to more than a mere license to take away the ice, and if so, ought to have been under seal, and was, therefore, revocable because it was not (*vide* Wood v. Ledbitter, 13 M. & W. 840).

J. M.

ANSWERS TO MOOT POINTS.

No. 39.—*Administration Bond—Witness (ante, p. 392).*

In answer to "Themis," I beg to state, that a Commissioner to administer Oaths in Chancery in England is one of the proper persons to attest the execution of an administration bond in the principal registry of her Majesty's Court of Probate; and I give this answer without hesitation, because I had an administration the other day, when I followed this course, and no objection was made to it.

R. G.

NOTICES TO CORRESPONDENTS.

A SUBSCRIBER.—An articulated clerk may safely engage in an agency to a company, if he does the work entirely out of office hours.

A. B. C.—The latest and best edition of Sheppard's Touchstone is that by Mr. Preston. The latest of Coke is that by Butler. They can both be bought second-hand, there being no very recent edition.

MOOT POINT No. 38, *ante*, p. 392, for "imperative" read "inoperative."

Lunatic Pauper. — Validity of order of adjudication.—The 16 & 17 Vic. c. 97, s. 68, provides for bringing lunatics wandering at large in any parish before a justice, and the justices before whom such person shall be brought are to examine him, and if satisfied that he is a lunatic, and wandering at large, and is a proper person to be taken care of, they may direct such person to be taken care of—they may direct such person to be received into an asylum; and, by s. 72, the justices are to send the lunatic to the asylum of the county or borough in which the parish from whence the pauper is sent is situated, unless there be no such asylum, or there be a deficiency of room, or some special circumstances, which want of room or special circumstances are to be stated in the order. It has been decided that an order of maintenance made under the above act may be made upon the clerk to the guardians of the parish in which the order is made. Where an order of adjudication recited an order of two justices for a city sending a lunatic found within their jurisdiction to county asylum, the court will presume that such two justices had jurisdiction, and that their order was valid, although it did not show directly at what time the lunatic became chargeable, nor that the person sent was a pauper. *Reg. v. Crediton*, 6 Week. Rep. 517.

Pawning medals of discharged soldiers.—At Marlborough-street, Mr. Beadon delivered an opinion as to the legality of receiving in pawn the medals of soldiers even after the discharge of their owners from the army. Mr. Beadon's opinion was, that the Mutiny Act actually prohibits the "detaining, buying, or receiving" such articles from any person whomsoever, an opinion which is in strict accordance with the words of the act. It should, therefore, be generally known, that not only can such medals not be legally pawned, but that they are not in any way whatever to be considered as commodities of sale or purchase.

CRIMINAL LAW.

APPEAL.—*Order of removal*—11 & 12 Vic. c. 81, s. 9—*Sufficiency of notice of appeal*—*Mandamus, time for applying for*.—A writ of mandamus, calling upon justices to enter continuances and hear an appeal, must be moved for in the term following the decision at the sessions. Where notice of chargeability and grounds of removal were posted by the respondents on the 28th of September, and received by the appellants on the 29th, and copies of deposition were applied for by post on the 19th of October, which application was received on the 20th, and notice of appeal sent within fourteen days from the receipt of such copy deposition: Held, that the notice of appeal was in time. *Reg. v. Recorder of Richmond*, 6 Week. Rep. 521.

APPEAL.—*Case*—*Computation of time*—*Sunday*—20 & 21 Vic. c. 43, s. 2.—By s. 2 of 20 & 21 Vic. c. 43, it is provided, that after the hearing and determination by justices of any information or complaint which they have power to determine in a summary way, either party may, if dissatisfied with the determination, as being erroneous in point of law, apply in writing within three days after the same to the said justices, to state and sign a case, &c., and, by s. 6, the superior court to which the case is transmitted is to hear and determine the question or questions of law arising thereon, &c.: Held, that where Sunday is one of the next three days after such a determination, the Sunday is to be counted as one of them, under the second section, and that where the last of such three days fell on a Sunday, and application was not made to the justices to state and sign a case until the following Monday, the application was too late, and the superior court had no jurisdiction to entertain the appeal. *Peacock v. Reg.*, 6 Week. Rep. 517.

CHARGE UPON RATES.—6 & 7 Will. 4, c. 96, s. 3—*Repayment*—*Negligence by lender*—*Mandamus*.—A bond charging a sum of money upon the security of the poor-rate, under 6 & 7 Will. 4, c. 96, s. 3, is a general charge upon the rate, and not a specific charge upon each of the next five years. At the expiration of the five years what part of the advance remains due may be paid out of the poor-rate. But the lender must not, after the expiration of the five years, be guilty of negligence in seeking to enforce his claims. *Heath v. Churchwardens of Hurstborne Tarrant*, 6 Week. Rep. 521.

FALSE PRETENCE.—*Misrepresentation of a matter of fact accompanied by a promise*.—Upon an indictment for obtaining money by false pretences, it appeared, that the prisoner told the prosecutrix that she kept a shop at a particular place, and that she might go home with her until she got a situation. She then borrowed 10s. of her, and promised to repay

it when they got home; but having got the money she left the prosecutrix altogether. It was untrue that she kept a shop at the place named; and the prosecutrix stated that it was on the faith of that representation that she parted with the money. The jury found the prisoner guilty of fraudulently obtaining the half-sovereign, the prosecutrix parting with it under the belief that the prisoner kept a shop at the place mentioned, and that she would have the money when she went home with the prisoner: Held, that the conviction was right. *Reg. v. Fry*, 30 Law Tim Rep. 293.

FALSE PRETENCES.—*Passing a £1 Irish bank note as a £5 note*.—A person who fraudulently offers £1 bank note as a note for £5, and gets it changed upon that representation, may be convicted under the statute for obtaining money by false pretences, although the party to whom it was passed could read, and the note upon the face of it afforded clearly the means of detecting the fraud. *Reg. v. Jessop*, 30 Law Tim. Rep. 293.

HAWKERS.—*Vagrant Act*, 3 Geo. 4, c. 83—*Hawkers Act*, 50 Geo. 3, c. 41.—A man who hawks about goods from house to house, and barter them for other goods, though he takes no payment in money, is, if he have no license as a hawker under the 50 Geo. 3, c. 41, s. 6, a petty chapman or pedlar under s. 3 of the 5 Geo. 4, c. 83 (the Vagrant Act), and is liable to be convicted as a vagrant under that section. *Druce v. Gabb*, 31 Law Tim. Rep. 98.

LARCENY.—*Fraudulent Trustees Act*.—To constitute larceny there must be an intention on the part of the thief completely to appropriate the property to his own use; and if at the time of the appropriation his intention is to make a mere temporary use of the chattels taken, so that the dominus should again have the use of them afterwards, that is a trespass, but not a felony (*Reg. v. Holloway*, 3 Cox Crim. Cas. 241, confirmed in *Reg. v. Poole*, 7 Id. 373). On an indictment for larceny the jury found the prisoner guilty, but recommended him to mercy on the ground that "they believed that he intended ultimately to return the property to the prosecutrix:" Held, that, although to constitute larceny it is necessary that the prisoner should have intended to deprive the prosecutor permanently of the property, this form of finding by the jury did not so qualify the verdict as to raise the question. The principle in *Reg. v. Holloway* (3 Cox Crim. Cas. 241) affirmed, that to constitute larceny there must be an intention permanently to deprive the owner of the property. *Semble*, that if not a larceny at common law, it would not have been a larceny by the bailee clause of the Fraudulent Trustees Act (20 & 21 Vic. c. 64, s. 4). *Reg. v. Trebilcock*, 30 Law Tim. Rep. 293.

PERJURY.—*Evidence*—*Parol statements by prisoner at variance with oath of statement on oath*—*Confirmatory circumstances*.—Where three witnesses proved that the prisoner had made parol statements contradictory to the truth of the statement upon which perjury was assigned, and the evidence of several witnesses went to confirm the truth of such parol statements, but there was no direct evidence that they were true, a conviction for perjury was supported. The prisoner, having laid an information against a publican for keeping open after lawful hours, swore at the hearing that he knew nothing of the matter except what he had been told, and that he did not see any person leave the house after eleven o'clock; and perjury having been assigned on this allegation, he was convicted. To prove that it was false, the magistrate's clerk's clerk proved a statement by the prisoner, when laying the information, that he had seen four men leave after eleven o'clock, and that he could swear to one W., and two other witnesses proved that the prisoner had made a statement to the same effect to them. It was further proved that W. did leave after eleven o'clock; that at the hearing, the prisoner had acknowledged that he had offered to smash the case for 30s.; and that he had talked of making the publican pay to settle it. A third witness proved that he had heard the prisoner offer to settle it for £1, and a fourth witness proved that the prisoner owned he had received 10s. to smash the case, and was to receive 10s. more: Held, that this evidence was sufficient to establish the falsehood of the prisoner's statement made on oath; and that he was properly convicted of the perjury alleged. *Reg. v. Walter Hook*, 6 Week. Rep. 518.

VESTRY.—*Right to vote*—*Occupiers and owners of small tenements*—58 Geo. 3, c. 69, s. 3—13 & 14 Vic. c. 99, s. 6.—By s. 3 of 58 Geo. 3, c. 69 (Sturges Bourne's Act), for the regulation of parish vestries, it is enacted, that "in all such vestries, every inhabitant present, who shall, by the last rate which shall have been made for the relief of the poor, have been assessed and charged upon or in respect of any annual rent, &c., not amounting to £50, shall have and be entitled to give one vote, and no more; and every inhabitant there present who shall in such last rate have been assessed, &c., in respect of any annual rent, &c., amounting to £50 or upwards, whether in one or in more than one sum or charge, shall have and be entitled to give one vote for every £25 of annual rent, &c., so, nevertheless, that no inhabitant shall be entitled to give more than six votes." By the 13 & 14 Vic. c. 99 (for the better assessing and collecting the poor rates and highway rates in re-

spect of small tenements), after empowering vestries to decide that the owners of tenements below the value of £6 may be rated for the relief of the poor instead of the occupiers, it is provided by s. 6, that "every such owner so rated as aforesaid shall have the same right to vote in vestry as if he were an occupier duly rated in respect of the same tenement." It has been decided, that since Sturges Bourne's Act, 58 Geo. 3, c. 69, s. 3, no inhabitants of a parish, except those rated to the relief of the poor, are entitled to vote at a vestry for any purpose; and, therefore, since 13 & 14 Vic. c. 99, s. 6, the occupiers of small tenements, not being so rated, cannot vote at a vestry in reference to a church rate. The owners of such small tenements, assessed to the poor rate in respect of them, are not entitled in any case to more than six votes, as limited by the former statute. *Richardson v. Gladwin*, 31 Law Tim. Rep. 97.

WATER COMPANY.—*Using for domestic purposes, what is.*—By a local act a water company were directed to supply the occupier of any house with water for domestic use, at certain annual rents, according to the poor-rate assessment of such house, and they were empowered to charge a different rate for the supply of water for other than domestic purposes. The appellant was the occupier of a house and a stable adjoining, and was supplied by the company with water according to the rate of assessment of his house. He made use of this water, not only for the domestic purposes of his house, but also for the purpose of cleaning his horse and carriage, and being convicted upon an information for using the water for other than domestic purposes in so using it for his horse and carriage: Held, that such use was a use for domestic purposes within the meaning of the act. *Busby v. The Chesterfield Waterworks and Gas Company*, 31 Law Tim. Rep. 98.

COUNTY COURTS.

APPEAL.—*From taxation of costs*—13 & 14 Vic. c. 61, s. 14.—By the 13 & 14 Vic. c. 61, s. 14, an appeal given where either party is dissatisfied with the determination or direction of the court in point of law, or upon the admission or rejection of any evidence, it has been held that there is no appeal to a superior court from an improper taxation of costs on the higher scale in a county court. The court, however, intimated their opinion that when a plaintiff in a county court claims more, but recovers less than £20, the costs ought to be taxed, not on the higher, but on the lower scale. *Carr v. Stringer*, 31 Law Tim. Rep. 96.

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